SUPREME COURT, U.S.

07-1-FEB 12 2007

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OSCAR B. SHIRANI,

Petitioner

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent

and

EXELON CORPORATION,

Intervening Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DOLORES C. PINO
Counsel of Record
7200 Wilson Terrace
Morton Grove, IL 60053-1142
(847) 965-3354

QUESTION PRESENTED

Whether the 1992 Congressional amendments to the nuclear whistleblower protection statute, Section 210 of the Energy Reorganization Act of 1978, which established a new, "free-standing" evidentiary framework for nuclear whistleblower complaints of discrimination, prohibit the Secretary of Labor and federal Courts of Appeals from continuing to apply the *McDonnell Douglas/ Mt. Healthy* evidentiary standards in adjudicating such complaints, as to which the Courts of Appeals are now in conflict.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii-iv
Table of Authorities	v-vii
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	1-2
Statement of the Case	3
Reasons for Granting the Petition	5-24

1. The Court of Appeals' Unpublished Decision Below, Following Its Own Authoritative Precedent Set By a 2005 Published Opinion, *Hasan v. U.S. Dep't of Labor*, is in Direct Conflict with the Published Decisions of Four Other Circuit Courts of Appeals Which Hold That the *McDonnell Douglas* Standards No Longer Apply to ERA Nuclear Whistleblower Claims Because Congress Created an Independent Evidentiary Framework for ERA claims in the 1992 Amendments 5

A. The Decision Below Presents a Conflict in the Circuits 5

B. This Conflict in the Circuits Interferes With the Uniform Administration of ERA Claims 10

2. The Court of Appeals Decision is Clearly Erroneous, Contradicting the Clear and Plain Language and Unequivocal Legislative History of the 1992 Congressional Amendments as to the Correct Burdens of Proof, and Making Other Serious Legal Errors 11

A. The 7th Circuit Decision Contradicts the Plain, Clear Statutory Language of the 1992 ERA Amendments 11

B. The Court of Appeals' and DOL's Misapplication of the *McDonnell Douglas* Evidentiary Framework to this ERA Case Likely Caused Other Serious Legal Errors 17-19

3. The Petition Involves a Question of National Importance 19

A. The Question is Recurring ... 19

B. Unfairness for a Large Number of People is Resulting From Discrepant Legal Rulings 21

C. A Nationally Binding Rule of Law is Now Needed to Clarify the Correct Evidentiary Standards for ERA Whistleblower Claims. 24

Conclusion 25

Separately Bound Appendix

7th Circuit Opinion 1-8

ARB Decision 9-32

ALJ Decision 33-91

Order Denying Rehearing 92

TABLE OF AUTHORITIES

Cases

Doyle v. *U.S. Sec. Labor*, 285 F.3d 243 (3rd Cir. 2002) 5, 6

English v. Gen. Elec. Co., 496 U.S. 72 (1990) 12

Gale v. Ocean Imaging, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. (ARB July 31, 2002)... 19

Hasan v. *U.S. Dep't of Labor*, 400 F.3d 1001 (7th Cir. 2005) 4, 5, 10, 13

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) ..... *passim*

Mt. Healthy v. *Doyle*, 429 U.S. 274 (1977) ..... *passim*

Muino v. Florida Power & Light Co., 2006-ERA-2, Rec. Order (ALJ April 13, 2006) 19

Sec. Agriculture v. *U.S.*, 347 U.S. 645 (1954)..... 20

Speegle v. Stone & Webster Constr., 2005-ERA-6, Rec. D & O (ALJ January 1, 2006) 19-20

Stone & Webster Engineering Corp. v. *Herman*, 115 F.3d 1568 (11th Cir. 1997) 6, 7-10, 13

Texas Dep't Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 13

Thompson v. *DOL*, 885 F.2d 551 (9th Cir. 1989) 20

Trimmer v. *U.S. Dep't of Labor*, 174 F.3d 1098 (10th Cir. 1999) 6-7

Williams v. Administrative Review Bd., 376 F.3d 471 (5th Cir. 2004) 5-6

Yule v. *Burns Interntl. Security*, 93-ERA-12, D & O of SOL (May 24, 1995)..... 20

Statutes

The Energy Reorganization Act ("ERA"), 42 U.S.C.A. § 5851 .... *passim*

The 1992 Amendments to the Energy Reorganization Act, Pub.L. 102-486, § 2902(d), adding par. (3), made effective by § 2902(i) to claims filed on or after October 24, 1992 .. .. *passim*

Other Legal Authority

H. Rep. No. 102-474(VIII) (1992), *reprinted in* 1992 U.S.C.C.A.N. 2297 22

138 CONG. REC. 32081-82 (1992) (statement of Rep. Miller) 14-15

138 CONG. REC. 32114 (1992) (statement of Rep. Williams) 15-16

138 CONG. REC. 32116-17 (1992) (statement of Rep. Ford) 16

OSHA "Whistleblower Investigations Manual", revised 8/22/03 20-21

Petitioner Oscar B. Shirani respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. App. 1-8. The decisions of the Secretary of Labor, by the Administrative Review Board and the Administrative Law Judge, are reproduced in the Appendix. ARB decision, App. 9-32, ALJ decision, App. 33-91.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 2006. A timely petition for rehearing was denied on November 13, 2006. App. 92. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The notifications required by R. 29.4 have been made.

STATUTORY PROVISIONS INVOLVED

The "Complaint, filing and notification" section of the nuclear whistleblower protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851(b), provides:

(3)(A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection

(a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

(B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior.

(C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

(D) Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

The 1992 Amendments to the Energy Reorganization Act, Pub.L. 102-486, § 2902(d), added this par. (3), and was made effective by § 2902(i) to claims filed on or after October 24, 1992.

STATEMENT OF THE CASE

This case presents a recurring question on an important matter relating to the proper evidentiary framework and burdens of proof in the nuclear whistleblower protection provisions of the ERA, 42 U.S.C. § 5851.

Petitioner Oscar B. Shirani is a nuclear safety auditor who brought a whistleblower lawsuit pursuant to 42 U.S.C. § 5851 against ComEd/Exelon, for being separated from his career there in relation to his protected safety activity.

The jurisdiction of the Court of Appeals was invoked as a petition for review of a final decision of the U.S. Department of Labor (DOL), Administrative Review Board (ARB), No. 03-ARB-100, dated September 30, 2005, which disposed of all claims, as permitted by F.R.A.P. 15 and the ERA, 42 U.S.C. § 5851(c)(1).

In 1992, Congress amended the ERA to provide an independent evidentiary framework for nuclear whistleblower claims brought pursuant to the ERA. Prior to these amendments, the DOL and the reviewing courts applied to ERA claims the evidentiary framework developed in the *McDonnell Douglas* caselaw for general employment discrimination cases.

However, in its administrative decisions on this case, the DOL applied the *McDonnell*

Douglas framework and its evidentiary standards to Mr. Shirani's ERA claim. ALJ decision, App. 74-75 (reciting employee's burden of proof as needing to prove that the protected activity was the "likely reason" for the adverse action and omitting the employer's burden of proof of "clear and convincing evidence" under the ERA), ARB decision at 8, App. 25-26 (repeating ALJ's application of Title VII "failure to hire" test and omitting the employer's burden of proof of "clear and convincing" evidence under the ERA).

The 7th Circuit issued a 2005 published opinion in *Hasan v. U. S. Dep't of Labor*, 400 F.3d 1001, 1004, (7th 2005), in which it specifically held that the *McDonnell Douglas* evidentiary framework applies to ERA claims. "The parties agree that the same standard for establishing a prima facie case of retaliation that is used in employment discrimination statutes such as Title VII is appropriate in retaliation cases brought under the Energy Reorganization Act, even though the procedure under that Act is administrative rather than judicial." *Hasan*, 400 F.3d at 1004.

The 7th Circuit decision below, also following the Circuit precedent in the *Hasan* opinion, explicitly applied the *McDonnell Douglas* framework in the last sentence on page three, App. 6, holding that Shirani had to prove that his termination was "based" on his protected activity, omitted any mention and application of

the employer's "clear and convincing burden of proof," and repeated the ARB's and ALJ's application of the "refusal to hire" version of the *McDonnell Douglas* test on page three, App. 5.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals' Unpublished Decision Below, Following Its Own Authoritative Precedent Set By a 2005 Published Opinion, *Hasan v. U.S. Dep't of Labor*, is in Direct Conflict with the Published Decisions of Four Other Circuit Courts of Appeals Which Hold That the *McDonnell Douglas* Standards No Longer Apply to ERA Nuclear Whistleblower Claims Because Congress Created an Independent Evidentiary Framework for ERA claims in the 1992 Amendments.

   A. The Decision Below Presents a Conflict in the Circuits.

In direct conflict with the 7th Circuit precedent in *Hasan* and the decision below, at least four other U.S. Courts of Appeals have reached this issue in published opinions and specifically held that the *McDonnell Douglas* framework no longer applies to ERA nuclear whistleblower claims because Congress provided an independent evidentiary framework for that statute in 1992. *See Doyle v. U.S. Sec. Labor*, 285 F.3d 243, 249-50 & n. 9 (3rd Cir. 2002), *Williams v. Administrative Review Bd.*, 376 F.3d

471, 476 and n.3 (5th Cir. 2004), *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999), and *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997).

In *Doyle*, 285 F.3d at 249-50, the Court of Appeals for the Third Circuit reviewed the new evidentiary framework, noting: "[t]he Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776, effective October 24, 1992, amended section 210 to incorporate a burden-shifting paradigm whereby the burden of persuasion falls first upon the complainant to demonstrate that retaliation for his protected activity was a 'contributing factor' in the unfavorable personnel decision."

In *Williams*, 376 F.3d at 476, the Court of Appeals for the Fifth Circuit reviewed the new evidentiary framework and wrote: "[i]n 1992, Congress inserted into the ERA an independent burden-shifting framework to be used in determining employer liability in claims brought under § 5851."

In *Trimmer*, 174 F.3d at 1101, the Court of Appeals for the Tenth Circuit wrote:

> [i]n 1992 Congress amended § 5851 of the ERA to include a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green*, 411

U.S. 792, 800-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

In footnote 4, the *Trimmer* court wrote:

> [t]he amendment to § 5851 became effective as to claims filed with the Secretary on or after October 24, 1992. *See* Energy Policy Act of 1992, Pub.L. No. 102-486, § 2902(i), 106 Stat. 2776, 3125. Accordingly, courts which have used the *McDonnell Douglas* burden-shifting framework to adjudicate ERA claims did so because the complaints were filed prior to that date. *See, e.g., Kahn v. Secretary of Labor*, 64 F.3d 271, 276 & n. 4, 277-78 (7th Cir. 1995); *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 930, 934 (11th Cir. 1995); *see also Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (rejecting *McDonnell Douglas* burden-shifting framework in favor of amended § 5851's burden-shifting requirements.)

In *Herman*, 115 F.3d at 1572 the Court of Appeals for the Eleventh Circuit wrote:

> [i]n 1992, Congress amended § 5851 to codify a particular framework regarding burdens of proof where no statutory guidance existed before. Energy Policy Act of 1992, P.L. 102-486, § 2902(d); *see also Mackowiak v. University Nuclear Systems,*

Inc., 735 F.2d 1159, 1164 (9th Cir. 1984) (upholding similar framework). Under the statutory framework, a complainant must first pass a gatekeeper test before an inquiry may commence. The Secretary may investigate only if the complainant succeeds in making a "prima facie showing" that retaliation for protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. § 5851(b)(3)(A). Then the investigation must go forward, unless the employer "demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior." 42 U.S.C. § 5851(b)(3)(B).

Section 5851's reference to a "prima facie showing" has bred some confusion, chiefly because the phrase evokes the sprawling body of general employment discrimination law. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The Secretary of Labor and S & W have quarreled over how these cases and their innumerable progeny affect Section 5851's evidentiary burdens. But Section 5851 is

clear and supplies its own free-standing evidentiary framework. After a complainant has cleared the prima facie gatekeeper test – and assuming she has not been knocked out by a preemptory "clear and convincing" response from the employer – the Secretary is to investigate whether the complainant's behavior actually was "a contributing factor in the unfavorable personnel action." 42 U.S.C. § 5851(b)(3)(C). The burden to persuade the Secretary falls upon the complainant, and she must do so by a preponderance of the evidence. *Dysert v. Sec. of Labor*, 105 F.3d 607, 610 (11th Cir. 1997). If the complainant succeeds, the employer has a second chance to offer "clear and convincing evidence" that it would have done the same thing anyway, i.e., "in the absence of such behavior." § 5851(b)(3)(D).

For employers, this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves. "Recent accounts of whistleblower harassment at both NRC licensee . . . and [Department of Energy] nuclear facilities . . . suggest that whistleblower harassment and retaliation remain all too common in parts of the nuclear industry." H. Rep. No. 102-474(VIII), at 79 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 2282, 2297. "These

> reforms," the House Report continues, "are intended to address those remaining pockets of resistance." *Id.*

Therefore, the 7th Circuit's decisions in *Hasan* and the decision below on this question stand in direct conflict with the authoritative opinions of four other Courts of Appeals.

B. This Conflict in the Circuits Interferes With the Uniform Administration of ERA Claims.

This Circuit split should be seen as intolerable because it creates unfairness to litigants, frustrates the uniform administration of the ERA by the Secretary of Labor, and creates the needless confusion for multi-circuit nuclear employers of different ERA legal standards for different regions.

This 7th Circuit precedent, standing alone, has and will create unfairness to ERA litigants, by allowing the federal benefits of the ERA's particular burdens of proof in most circuits while denying them in the 7th Circuit's jurisdiction.

This conflict also "encourages non-acquiescence" by the DOL, by forcing the administrative adjudication staff to choose between the uniform administration of the ERA statutory scheme and obedience to the differing

ERA evidentiary burdens applied by the 7th Circuit and the other Courts of Appeals.

This conflict also has the potential to impose unjustified economic costs on the nuclear industry. Confusion as to the governing law most likely exists for multi-circuit nuclear corporations with these different evidentiary standards for ERA cases in different Circuits. It is also possible that nuclear employers in the 7th Circuit could obtain an unfair competitive advantage on ERA claims through the more lenient ERA evidentiary standards allowed by the 7th Circuit precedent.

2. The Court of Appeals Decision is Clearly Erroneous, Contradicting the Clear and Plain Language and Unequivocal Legislative History of the 1992 Congressional Amendments as to the Correct Burdens of Proof, and Making Other Serious Legal Errors.

A. The 7th Circuit Decision Contradicts the Plain, Clear Statutory Language of the 1992 ERA Amendments.

The nuclear whistleblower protection section of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851, provides that employees of nuclear power plants and other regulated nuclear entities may bring complaints of discrimination for adverse personnel actions related to their bringing forth nuclear safety

concerns – the "protected activity." The ERA provides remedies for successful complainants of job reinstatement and compensatory damage awards, among other relief.

The important legislative intent behind this section of the ERA is to encourage workers at nuclear plants to come forward freely with safety concerns they encounter, and to protect their jobs when they do come forward. *English v. Gen. Elec. Co.*, 496 U.S. 72, 82 (1990).

Prior to October 1992, this statute contained no guidance on the applicable burdens of proof for such complaints, so the DOL and the federal courts reviewing decisions under this statute applied the *McDonnell Douglas* burden-shifting evidentiary framework used in general employment discrimination cases. However, around 1989, Congress began amending several of the important federal whistleblower protection statutes, including the ERA, to make it easier for employees to prevail in their whistleblower complaints than it had been using the *McDonnell Douglas* framework.

Effective October 24, 1992, Congress amended the ERA by adding explicit burdens of proof to the statutory language. These amendments lowered the level of contribution of the protected activity to the adverse job action – which the employee needs to prove by a preponderance of the evidence – from being a "substantial factor" under *McDonnell Douglas* to

only a "contributing factor." *See, e.g., Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997). Congress also changed the employer's *McDonnell Douglas* burden of production of only making a showing of legitimate business reason for the adverse personnel action to making it an actual burden of proof, and making it the highest civil law burden of proof, "by clear and convincing evidence." *Id*; *Texas Dep't Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981) (the employer's burden is not one of persuasion but is one of production of admissible evidence, only the burden of explaining clearly the nondiscriminatory reasons for its action).

The language of these amendments in the ERA statute is plain and clear, making any attempted defense of this legal error involving varying "statutory interpretations" very weak. The 7th Circuit made no such statutory interpretation arguments; the *Hasan* decision contains a conclusory sentence stating the *McDonnell Douglas* test applies to ERA claims with no analysis of the statutory language of 42 U.S.C. § 5851, and the unpublished panel decision in Mr. Shirani's case did not address this issue.

Further, the legislative history is unequivocal that in the 1992 ERA amendments, Congress intended to replace the burdens of proof of the *McDonnell Douglas/ Mt. Healthy* framework with a lower burden for the employee and a higher

burden for the employer in order to make it easier for nuclear whistleblowers to prevail in ERA claims for discrimination. *See* 138 CONG. REC. 32081-82 (1992) (statement of Rep. Miller):

> Title XXIX of the conference agreement creates a new paragraph (3) in section 210(b) of the Energy Reorganization Act of 1974. Paragraphs (3)(A) and (3)(B) impose a limitation on the investigative authority of the Secretary of Labor in whistleblower cases. If the complainant does not make a prima facie showing that protected activity contributed to the unfavorable personnel action alleged in the complaint, the Secretary must dismiss the complaint and cease the investigation. And if the employer demonstrates by clean [sic] and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior, the Secretary must cease the investigation. These limitations apply only to the Secretary's prosecution of the complaint. The complainant is free, as under current law, to pursue the case before the administrative law judge if the Secretary dismisses the complaint. At the administrative law judge hearing and in any subsequent appeal, the complainant's burden of proof will be governed by new section 210(b)(3) (c) and (d). Once the complainant makes a prima facie showing that protected activity contributed to the

> unfavorable personnel action alleged in the complaint, a violation is established unless the employer establishes by clean [sic] and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.
>
> The conferees intend to replace the burden of proof enunciated in *Mt. Healthy* v. *Doyle,* 429 U.S. 274 (1977), with this lower burden in order to facilitate relief for employees who have been retaliated against for exercising their rights under section 210.

See also 138 CONG. REC. 32114 (1992) (statement of Rep. Williams):

> A compromise was reached providing for the first time meaningful protection for whistleblowers in the nuclear industry. Obstacles have been removed that had discouraged employees from bringing to the attention of the public information about potential health and safety problems. These provisions will protect not only employees and the public but will also help build confidence in the industry.
>
> The whistleblower reforms include extending from 30 days to 180 days the time for filing a complaint. A new burden of proof is established that makes it more

> realistic for an employee to prevail in a case of retaliation.

See also 138 CONG. REC. 32116-17 (1992) (statement of Rep. Ford):

> The conferees intend to replace the complainant's burden of proof enunciated in *Mt. Healthy* v. *Doyle*, 429 U.S. 274 (1977), in order to facilitate relief for employees who have been retaliated against for exercising their rights under section 210.

Therefore, Congress clearly amended the ERA in 1992 by adding a "free-standing" evidentiary framework. While similar to the *McDonnell Douglas* framework, these amendments clearly contain different burdens of proof than those of *McDonnell Douglas*. The ERA evidentiary standards are lessened on the employee and heightened on the employer compared to those applied by the DOL and courts prior to the 1992 amendments.

Since 1992, the employee's burden of proof under the ERA has been to prove that the protected activity was only "a contributing factor" in the adverse personnel action, lessened from a "substantial factor", and the employer's evidentiary standard is no longer only the burden of production of showing a legitimate, non-discriminatory reason for the adverse action, but is an actual burden of proof, and is

the highest civil law burden of proof, that of "by clear and convincing evidence."

B. The Court of Appeals' and DOL's Misapplication of the *McDonnell Douglas* Evidentiary Framework to this ERA Case Likely Caused Other Serious Legal Errors.

- Serious Error in Eliminating a Significant Part of Petitioner's Case

The 7th Circuit and DOL decisions ignored the employer's refusal to grant Shirani's requests to return to the nuclear section from the financial area where he had transferred and from which he was terminated, despite that this unfavorable job action continued through the day he was terminated and ended within the limitations period.

- Serious Error in Knowledge Element:

The ALJ and ARB concluded that the "employer" as relevant to the question of employer knowledge was one person, Shirani's direct supervisor at the time of his termination, Ellen Dee Caya. The record actually shows that Ellen Dee Caya admitted in her testimony that she knew about Shirani's protected activity, that Shirani told her about an audit of GE he conducted that was not favorably received. Tr. 564-65.

But the ARB and ALJ decisions, as well as the 7th Circuit decision at p. 3, made the serious error of failing to recognize that this direct testimony of Caya stating she knew of Shirani's protected activity, his high profile GE audit that caused unfavorable views at ComEd, is sufficient to meet the knowledge prong of the prima facie case. This testimony is not contradicted anywhere in the record, and therefore, by definition, this testimony constitutes substantial evidence that the employer had knowledge of the Petitioner's protected activity.

- Serious Error in Evaluating Employer's Evidence of Legitimate, Non-discriminatory Reason for Adverse Actions

The employer's evidence in this case consists of alleging Mr. Shirani applied for a job for which he was not qualified during a reorganization, and he was then eliminated from the corporation. But that job application contains a signature which does not match Mr. Shirani's signature, and the dates on the job description and application do not match the testimony of the manager in charge. On review, the 7th Circuit did not apply the ERA's "clear and convincing" evidence burden of proof to this employer evidence, and instead seemed to apply only the *McDonnell Douglas* employer's burden of production.

- Serious Error in Evaluating the Evidence of Retaliatory Motive

The 7th Circuit and ARB decisions ignored the overwhelming amount of evidence in the record showing retaliatory motive and the interrelations among the group of decision makers who held and exercised personnel authority over Shirani.

3. The Petition Involves a Question of National Importance.

A. The Question is Recurring.

In addition to the DOL's incorrect application of the ERA law in Mr. Shirani's case in recent years, the same mistake was made in a case cited in the ARB opinion in Mr. Shirani's case, *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 9 (ARB July 31, 2002). Other cases in which the *McDonnell Douglas* standards were applied to ERA claims, in whole or in part, confusing or eliminating the evidentiary framework of the 1992 ERA amendments, are: *Muino v. Florida Power & Light Co.*, 2006-ERA-2, Rec. Order at 5-6 (ALJ April 13, 2006) (stating that the prima facie case includes that the protected activity was the likely reason for the adverse action and applying general Title VII employment discrimination law), and *Speegle v. Stone & Webster Constr.*, 2005-ERA-6, Rec. D & O at 29-30 (ALJ January 1,

2006) (applying Title VII burdens of proof despite reciting correct ERA burdens of proof).

Moreover, in the 1990's, the DOL issued decisions in which it did recognize and apply the 1992 ERA amendments to ERA claims. *See, e.g., Yule v. Burns Internt'l. Security*, 93-ERA-12, D & O of SOL at 4 and n. 4 (May 24, 1995) (recognizing and applying new ERA burden of proof on employer of "by clear and convincing evidence"). An administrative agency is either obligated to follow its own precedents or explain its departure from them, both of which the DOL failed to do in Mr. Shirani's case. *See, e.g., Thompson v. DOL*, 885 F.2d 551, 557 (9th Cir. 1989), *Sec. Agriculture v. U.S.*, 347 U.S. 645, 653 (1954).

ERA discrimination claims are arising from the 7th Circuit's jurisdiction in real numbers. In response to Petitioner's attorney's recent Freedom of Information requests asking for the numbers of ERA claims being filed, the Occupational Safety and Health Administration (OSHA) (where the administrative process for ERA claims begins) produced documentation that between one and several ERA whistleblower claims were filed by nuclear workers in Illinois and Wisconsin every year since 2000.

Also, the internal guidance manual used by OSHA staff to investigate ERA claims contains confusing recitation of the evidentiary standards. *See* OSHA's "Whistleblower

Investigations Manual", revised 8/22/03, available at www.osha.gov/OshDoc/Directive_pdf/DIS_0-0_9.pdf. In the beginning, general instructions for whistleblower investigations in this manual, the employer defense described is the *McDonnell Douglas* type of burden of production. "Field Investigation – Burden of Proof" at p. 3-2, 3-3. While later, in the specific section for ERA claims at p. 12-2, the ERA employee burden of proof of a "contributing factor' is recited, the manual does not clarify that the ERA burdens are distinct from the general ones used for other whistleblower statutes and must be applied without reference to those general burdens. Confusion for OSHA investigators thus could be caused by lack of specific enough instructions on ERA claims in this manual.

B. Unfairness for A Large Number of People is Resulting From Discrepant Legal Rulings

The 7th Circuit's and DOL's continuing, incorrect application of the *McDonnell Douglas* test to ERA claims, in direct violation of Congress' 14-year-old lessened burden of proof on employees and heightened burden of proof on employers, negatively affects the health, safety, and welfare of the people of Illinois and Wisconsin.

The people of Illinois bear the risk of living with the most nuclear power plants in the U.S.,

eleven operating in northern Illinois surrounding the Chicago metropolitan area. In addition, there are a dozen or so additional sites containing highly radioactive nuclear material, including decommissioned nuclear plants and various nuclear storage sites.

Congress first singled out nuclear employees for special protection from retaliation for raising safety concerns when it enacted the employee protection provision of the ERA in 1978, which was strengthened in the 1992 amendments. Congress wrote in the House Report for the 1992 amendments:

> The ability of nuclear industry employees to come forward to either their employers or to regulators with safety concerns without fear of harassment or retaliation is a key component of our system of assuring adequate protection of public health and safety from the inherent risks of nuclear power. Recent accounts of whistleblower harassment at both NRC licensee . . . and DOE nuclear facilities . . . suggest that whistleblower harassment and retaliation remain all too common in parts of the nuclear industry. These reforms are intended to address those remaining pockets of resistance.

H. Rep. No. 102-474(VIII), at 79 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2297.

Nuclear plant safety problems are continuing to occur within the 7th Circuit's jurisdiction:

- Between 1996 – 2000, over six million gallons of radioactive, tritiated water leaked from ComEd/Exelon's Braidwood nuclear power plant in Illinois. See press release of Illinois Attorney General, http://www.ag.state.il.us/pressroom/2006_03/20060316.html.

- The NRC's current nuclear reactor oversight process is individualized for each nuclear power plant, and measures safety performance by a series of specific indicators. However, on this safety performance index, the Exelon nuclear power plants in Illinois remain sub-par. See http://www.nrc.gov/NRR/OVERSIGHT/ASSESS/actionmatrix_summary.html, showing that Illinois nuclear plants Braidwood 1 and 2, Byron 2, Dresden 2, and Quad Cities 1 are currently in the "Regulatory Response Column" due to safety performance findings requiring corrective action.

- In Wisconsin, all three of the nuclear power plants in the state, the Kewaunee and Point Beach 1 and 2, are currently in the NRC's corrective actions columns on this safety performance index.

For these reasons, the people of Illinois and Wisconsin deserve at minimum that the jobs of nuclear employees are protected under the ERA to the level Congress set for them in 1992. This

will help encourage employees to come forward to report nuclear safety problems, and to know that if they suffer retaliation, they will have their clams adjudicated in the more employee-protective form provided by Congress.

C. A Nationally Binding Rule of Law is Now Needed to Clarify the Correct Evidentiary Standards for ERA Whistleblower Claims.

The 7th Circuit's and DOL's continuing application of the *McDonnell Douglas* evidentiary framework to ERA claims is directly contrary to the ERA's plain, clear statutory language, its unequivocal legislative history, and the explicit policy of Congress.

This Court should now clarify the correct burdens of proof and evidentiary framework for the ERA. Also needed are answers to whether and to what extent the Secretary of Labor and Courts of Appeals may continue to apply other relevant aspects of the *McDonnell Douglas* caselaw to ERA whistleblower claims, that would not nullify the burdens of proof and statutory elements of the 1992 ERA amendments.

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted by,

Dolores C. Pino, Attorney for
Petitioner Oscar B. Shirani

February 12, 2007

Supreme Court, U.S.
FILED
06114 FEB 12 2007
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OSCAR B. SHIRANI,

Petitioner

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent

and

EXELON CORPORATION,

Intervening Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

DOLORES C. PINO
Counsel of Record
7200 Wilson Terrace
Morton Grove, IL 60053-1142
(847) 965-3354

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued June 8, 2006
Decided June 28, 2006

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

No. 05-4455

Petition for Review of an Order of the Department of Labor

OSCAR B. SHIRANI,
Petitioner,

v.

No. 03-ARB-100

UNITED STATES DEPARTMENT OF LABOR,
Respondent,

and

EXELON CORPORATION,
Intervening Respondent.

ORDER

Oscar Shirani began his career as an engineer with Commonwealth Edison, an Illinois electric utility, in 1990. In 1994, he moved into ComEd's quality assurance department, where his job involved performing audits on companies that supplied equipment or services for ComEd's nuclear power plants. By all accounts, Shirani received good assignments and favorable performance evaluations. But two incidents led to friction with his superiors.

In 1997, Shirani led an audit of a General Electric Nuclear Energy (GENE) facility in San Jose, California. His team identified a number of safety problems, [end of p. 1] and Shirani recommended that ComEd issue a stop-work against GENE, which ComEd did. In an unfortunate twist of fate for Shirani, a GENE manager with whom he had tangled during the audit, David Helwig, became, a year later, a ComEd vice-president. Shirani came to believe that Helwig was blocking his career at ComEd in retaliation for Shirani's work on the GENE audit and an argument the two of them had had during the site visit.

In 2000, Shirani conducted an audit involving "dry casks" (which are used to store spent nuclear fuel) supplied by Holtec International/U.S. Tool & Die Co. At a meeting later that year sponsored by Holtec, Shirani

piped up from the audience and asked company officials about their compliance with the report his team had issued. A federal Nuclear Regulatory Commission official was in the audience and asked Shirani to send him a copy of the audit report. At least one of Shirani's superiors indicated annoyance that the NRC had learned of the Holtec audit. The NRC official later asked Shirani why he had not issued a stop-work order against Holtec, and Shirani responded that he had been afraid of losing his job.

Also in 2000, ComEd's parent Unicom merged with PECO Energy Corp. to become Exelon Corp. Consequently, ComEd employees had to reapply for their jobs. Shirani was re-selected for the job he occupied as a principal auditor but was turned down for several management positions. Discouraged by his inability to advance in ComEd's nuclear section, Shirani sought a different audit position in Exelon's business services area. The new job raised his salary from $86,887 to $94,000. He accepted it with the understanding that the job was an opportunity to learn to be a nonsupervisory auditor and that the internal audit area would be undergoing organizational changes as the dust settled from the ComEd-PECO merger.

Eventually, the internal audit employees had to reapply for their jobs as well. Rather than reapply for the staff auditor job he was in, which

was due to be bumped down to a lower salary grade as part of the new organizational plan, Shirani applied for a management position for which he was previously warned he might not be qualified. He understood he could not remain in his staff auditor job if he did not reapply for it. Shirani didn't get the promotion, and since he had not reapplied for his old job, he was automatically terminated.

Shirani then filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration alleging violations of the whistleblower protection provision of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851. He alleged that Exelon fired him in retaliation for his participation in protected activity – namely, the 1997 GENE audit and the 2000 Holtec audit which he discussed with the NRC official. OSHA investigated Shirani's complaint and concluded there was no connection between the protected activity and his [end of p. 2] termination. An administrative law judge, after a 3-day hearing, also recommended that Shirani's complaint be dismissed. The Administrative Review Board (ARB) of the United States Department of Labor concurred with the ALJ's recommendation and dismissed the complaint. This appeal followed.

We review cases arising under the ERA according to standards provided by the Administrative Procedure Act. 42 U.S.C. § 5851(c)(1); Kahn v. U.S. Sec'y of Labor, 64 F.3d 271, 276 (7th Cir. 1995). Given Congress's

recognition of an agency's special competence to handle such matters, a court's review must be deferential. Kahn, 64 F.3d at 276. We may overturn the Review Board's decision only if we find it is "unsupported by substantial evidence" or if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (E); Kahn, 64 F.3d at 276. Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Substantial evidence may be less than a preponderance of the evidence, ... and a reviewing body may not set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis." Kahn, 64 F.3d at 276 (citations omitted).

Under procedures established for investigations under the ERA's whistleblower provisions, Shirani was required to establish that the officials who decided not to hire him as a manager during the internal audit reselection process knew of the protected activity in which he had engaged while he was in his nuclear job, see 29 C.F.R. § 24.5(b)(2)(ii), and that the circumstances were sufficient to raise an inference that the protected activity contributed to his termination, see 29 C.F.R. § 24.5(b)(2)(iv).

The Administrative Review Board found that the company official who offered Shirani the internal audit job in 2000, Ruth Ann Gillis,

knew that Shirani had been unhappy on the nuclear side of ComEd's operations but was unaware of his clashes with superiors over the GENE and Holtec audits. Moreover, the ALJ who heard Shirnai's case made a specific demeanor-based credibility finding about Gillis's testimony, finding her to be a "highly credible witness and her testimony compelling." The head of internal audit who did not select Shirani for the management job for which he applied, Ellen Caya, also testified that she knew nothing about Shirani's previous problems and that no one ever suggested to her that she should or should not select Shirani. Gillis's and Caya's testimony clearly meets the statutory standard of substantial evidence needed to support the Board's decision that Shirani's termination was not based on his protected activity. [end of p. 3]

Shirani argues that the Board's decision was arbitrary and capricious because it failed to credit evidence that others within ComEd/Exelon besides Caya had retaliatory motives against him and that their motives somehow contributed to the decision not to hire Shirani into a job for which he had previously been warned he might not be qualified. But even if our review of the record left us persuaded that the Board overlooked some evidence favorable to Shirani's case, that would not be enough to outweigh the substantial evidence on which the Board based its decision. We are not free to set aside the Board's factual conclusion simply because we "find the opposite conclusion more

reasonable or because [we] question the factual basis." Kahn, 64 F.3d at 276.

Finally, Shirani claims that the Board's decision was arbitrary and capricious because it ignored ComEd's alleged refusal to grant his requests to return to the nuclear section. Shirani says the company's alleged refusal to allow him to return to the nuclear section "was not one discrete act; it took place over a period of time, in fact, on each day until he was given notice he was going to be let go." Shirani cites Place v. Abbott Labs., 215 F.3d 803, 808 (7th Cir. 2000), in support of his theory that the company's lack of interest in transferring him back to his old area was a "continuing violation," a situation "where the employer's discriminatory conduct is so covert that its discriminatory character is not immediately apparent." Id.

We cannot agree that Place supports Shirani's theory of his case. In Place we explained that "[t]he continuing violation scenario makes most sense in a sexual harassment case, where the first offensive comment or inappropriate touch may not alert the victim to the harassing quality of the conduct. A job transfer is quite different. Like being fired, demoted, or not promoted, a job transfer is a single, significant event, not a continuing act." Id. (citation omitted). Shirani has not pointed to anything in the record to indicate he ever actually applied and was turned down for a job that would have transferred him

back to the nuclear section. Thus, even if we accept as true that he communicated to company officials his desire to transfer and they chose to ignore him, such evidence would be too amorphous for us to evaluate as concrete evidence of an act that discriminated against him based on his status as a whistleblower.

For these reasons, Shirani's petition for review is DENIED, and the ARB's order dismissing Shirani's complaint is AFFIRMED. [end of p. 4]

U.S. Department of Labor
Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

USDOL/OALJ REPORTER PAGE 1

In the Matter of:

OSCAR B. SHIRANI, ARB CASE NO. 03-100
COMPLAINANT, ALJ CASE NO. 2002-ERA-28
v. DATE: September 30, 2005

COMED/EXELON
CORPORATION,
RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Michael C. McDermott, Esq., *Chicago, Illinois*

For the Respondent:
Scott E. Gross, Esq., Darren R. Reisberg, Esq.,
Sidley Austin Brown & Wood,
Chicago, Illinois

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Energy

Reorganization Act, 42 U.S.C.A. § 5851 (West 2003), and implementing regulations at 29 C.F.R. Part 24 (2005). Oscar Shirani complains that his employer, Business Services Company, a subsidiary of the Exelon Corporation, violated § 5851 when it terminated his employment in December 2001. On April 30, 2003, a Labor Department Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) recommending that Shirani's complaint be dismissed. For the reasons that follow, we concur and dismiss the complaint.

BACKGROUND

Oscar Shirani holds a Bachelor of Science and Masters degrees in civil engineering. Tr. 45. He commenced his employment with Commonwealth Edison

Company (ComEd) in 1990 as a structural engineer. Tr. 45, 54. In 1994, Shirani moved to the Supplier Evaluation Services (SES) group in ComEd's Quality Assurance Department. Tr. 68, 252. Shirani's primary duties in SES were to perform audits of nuclear suppliers who provided material or services to ComEd's nuclear power generation plants. Tr. 743.

In October 2000, ComEd became a subsidiary of the Exelon Corporation. Tr. 665. Shortly thereafter, Shirani moved to another

Exelon subsidiary, Business Services Corporation (BSC), to take a position as a non supervisory auditor in the internal audit unit. Tr. 396.

In October 2001, BSC substantially restructured internal auditing, created new positions, and posted the positions for bidding by Exelon employees. All employees were required to reapply for their jobs. Tr. 489. Though Shirani had no management experience and was still learning how to conduct financial audits, he applied for a principal/manager auditor position. Tr. 549. Shirani did not apply for the non-supervisory position he currently held, though encouraged to do so. Tr. 543. The internal audit manager rejected Shirani's application for principal auditor and instead selected applicants with substantial management and financial auditing experience. Tr. 546, 556-557. Since Shirani did not apply for the non-supervisory position he currently held, Com Ed/Exelon automatically terminated his employment. Tr. 398.

Shirani filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA), alleging that ComEd/Exelon terminated his employment "in retaliation for his participation in Nuclear Regulatory Commission (NRC) proceedings." CX 1 at 1. After an investigation, OSHA found Shirani's complaint to be without merit.

Shirani appealed OSHA's finding. A hearing was held in December 2002.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ's recommended decision in cases arising under the environmental whistleblower statutes. *See* 29 C.F.R. § 24.8. *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's recommended decision. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000). The Board is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature. *See* Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the

agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself"). In weighing a witness's testimony, the fact-finder considers the relationship of the witness to the parties, the witness's interest in the outcome of the proceedings, the witness's demeanor while testifying, the witness's opportunity to observe or acquire knowledge about the subject matter of the witness's testimony, and the extent to which other credible evidence supported or contradicted the testimony. *Jenkins v. United States Envtl. Pro. Agency,* ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 10 (ARB Feb. 28, 2003) (citations omitted). The ALJ, unlike the ARB, observes witness demeanor in the course of the hearing, and the ARB will defer to an ALJ's credibility determinations that are based on such observation. *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 93-ERA-6, slip op. at 6 (ARB July 14, 2000). *See Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 99-STA-21, slip op. at 9 (ARB July 31, 2001) ("The Board gives great deference to an ALJ's credibility findings that 'rest explicitly on the evaluation of the demeanor of witnesses. '"), *citing NLRB v. Cutting,* 701 F.2d 659, 663 (7th Cir. 1983)).

FINDINGS OF FACT

Having reviewed the entire record, the ALJ's recommended findings of fact, and the parties' arguments on review, we make the following findings of fact. In so doing, we defer to the ALJ's credibility finding that Ruth Ann Gillis, whose testimony contradicted Shirani's testimony in significant part, "was a highly credible witness and her testimony compelling." R. D. & O. at 24. We also note that our findings of fact are consistent with the ALJ's findings in all material respects.

ComEd merger with PECO and creation of Exelon in 2000

ComEd, a subsidiary of Unicom, operates power generation plants in the Chicago area. Tr. 54. In October 2000, Unicom Corporation merged with PECO Energy Corporation, which operated power generation plants around Philadelphia. ComEd and PECO became subsidiaries of Exelon Corporation. Tr. 664-665.

The ComEd and PECO workforces were merged and downsized in a "re-staffing" process. Tr. 763. The re-staffing consisted of three steps: Exelon first determined its new staffing needs. Exelon then posted the new positions on the company computer network. Tr. 358-359. Any ComEd or PECO employee who wanted to work for Exelon could apply for a position. Incumbents who did not apply for a position were automatically terminated with severance benefits that included severance pay and re-

employment assistance. Workers who applied but were not selected were also automatically terminated with severance benefits. RX 33.

In 2000, Shirani re-applied for the principal auditor position he already held in SES. Tr. 263, 763, 769. But he really wanted a promotion and applied for some management positions as well. Tr. 358-359, 361. Shirani was not selected for any of the management positions for which he applied, but he was re-selected for his SES principal auditor job. Tr. 470-471.

USDOL/OALJ REPORTER PAGE 4

Shirani's career in SES from 1994 until January 2001

In his capacity as an SES auditor, Shirani participated in or served as group leader in numerous audits of nuclear equipment manufacturers and service providers. Tr. 82, 87. When he served as group leader, it was his responsibility to write the audit report, which included information about deficiencies, if any, in the audited product or service, and to make recommendations for remedial action. 84, 122, CX 17.

Shirani's SES supervisor approved every audit report and recommendation for remedial action that Shirani made. Tr. 435, 442-446, 447, 755-757, 787, 796. During his tenure in SES, Shirani received a promotion, favorable

performance evaluations, important assignments, and frequent praise from his supervisor. Tr. 76-77, 82, 93, 438-439 When Shirani's supervisor re-selected him for the principal auditor position in 2000, he chose Shirani over other incumbents, whose employment was terminated.

Nonetheless, Shirani testified about two incidents which, he argues on review, show that high-level officials in ComEd were hostile to Shirani's work in SES. One involved an audit in 1997 at the General Electric Nuclear Energy (GENE) facility in San Jose, California. The other involved an industry symposium on the east coast in 2000.

In the 1997 GENE audit, Shirani and his team identified numerous safety deficiencies in the audited operations. Tr. 112 -122. During the exit interview, Shirani and one of GENE's managers, David Helwig, argued about Shirani's unwillingness to give GENE credit for corrective action it was already taking on its own. Tr. 209-212. In his report, Shirani recommended that ComEd issue a stop work order. Shirani's supervisor approved Shirani's report and stop-work recommendation and both were put into effect. Tr. 120-124, CX 4, CX 5.

In 1998, Helwig became a vice president of ComEd and participated in an effort to increase ComEd's nuclear power output. Tr. 174, 338. Over the next two years, Shirani

sought Helwig out half a dozen times for career advice. Tr. 186-187, 230-231, 236, 466-467. "David, I need your assistance to mentor me more than any other time. . . . Please set up a convenient time that I can see you more frequently for mentorship. I really appreciate your help. Thanks!!!" RX 42 (September 7, 2000 email). Helwig encouraged Shirani to stay in nuclear auditing because that is Shirani's area of expertise. Tr. 186-189.

The second incident occurred in November 2000. Although he was not invited, Shirani attended an industry symposium sponsored by Holtec International. During an open discussion, Shirani raised questions relating to a Holtec audit in which he had participated. Tr. 17-18. Also attending the symposium was a Nuclear Regulatory Commission engineer, Ross Landsman. Tr. 18-19. After the discussion period, Landsman asked Shirani for a copy of the audit report. Tr. 401. Shirani passed on Landsman's request for the report to the appropriate office at ComEd, which forwarded the report to Landsman. Tr. 21-23, 401-402, 782. In January 2001, after Shirani had left

SES, Landsman called Shirani and asked him why he did not issue a stop work order against

Holtec. Tr. 24-25. Shirani told Landsman he was afraid of losing his job. *Id.*; 400-403.[1]

Move to BSC internal auditing

In early 2000, Shirani approached Ruth Ann Gillis, Vice President and Chief Financial Officer of Unicom, and asked her to be his mentor. Tr. 664. After that he often complained to her about his limited opportunities for advancement in SES. "I need your help because I am not getting it at our nuclear side of the house and I want to jump." RX 8; cf. Tr. 669-672.

Around the time of the general merger, Shirani asked Gillis for a job in business services. Tr. 678. Gillis explained to Shirani that ComEd and PECO's internal audit departments would not merge until the following year. ComEd had been outsourcing most of its internal auditing to Arthur Anderson in Chicago. PECO had an in-house internal audit unit in

---

[1] Shirani testified in great detail about the GENE audit and the NRC contact, as well as other events that, he argues, show that ComEd executives involved in nuclear power generation conspired against him because his nuclear safety standards were higher than theirs. However, Shirani failed to establish any connection between these alleged events and the adverse action of which he complains – non-selection for a principal auditor position in BSC. Thus, we recount this abbreviated version of Shirani's history in SES primarily to assist the reader in understanding Shirani's theory of the case.

Philadelphia. Tr. 677, 506. Before merger and re-selection could begin, BSC would need to decide on the best structure for the integrated internal audit function. Gillis planned to hire a General Auditor sometime in 2001 to guide the reorganization and reselection. In the meantime, if Shirani were to take an internal auditor position in Chicago, he would have to report to Arthur Anderson, work without a formal position description, and be prepared for whatever changes the General Auditor might make. Tr. 397, 506, 675-682, 715-720; RX 9. In short, giving Shirani a job in internal audit at that point would mean Shirani could acquire new skills, especially in financial auditing but, Gillis emphasized to him, she was making "no promises whatsoever about Oscar becoming a manager." Tr. 720.

At the time Shirani asked Gillis for a job in finance, his SES salary was $86,887, in pay band E-3. The maximum salary for pay band E-3 was $100,000. RX 9; Tr. 662. The principal auditor position Gillis offered Shirani in December 2000 had a salary of $92,500, in pay band E-4. The maximum salary for pay band E-4 was $126,000. RX 9, Tr. 662; 682-685; Tr. 387. Thus, Gillis' offer meant a promotion from pay band E-3 to E-4, an immediate pay raise of 6.46 % and the opportunity to increase his salary by as much as $26,000 in future merit pay increases. Tr. 661.

Shirani was disappointed with Gillis' offer. He complained that it was not a promotion to a management position and that he would have commuting expenses in the new job that he had not had as an SES auditor. Tr. 478, 682-683. Gillis was sympathetic

USDOL/OALJ REPORTER PAGE 6

to the commuting costs issue and increased the offer to $94,000. Tr. 682-685; RX 9. Shirani took time to think it over and then accepted the revised offer on December 19, 2000. Tr. 480. He began his new job at BSC on January 15, 2001. Tr. 396.

Shirani participated in several internal audits over the next ten months under Arthur Anderson supervision. Tr. 689. In his first formal performance evaluation, Arthur Anderson gave him an overall rating between "achieves expectations" and "developmental." RX 2. On his second evaluation, Arthur Anderson rated Shirani one step higher, between "achieves expectations" and "commendable." *Id.*

Internal auditing merger and re-selection process

In April 2001, Gillis hired Ellen Caya from the accounting firm Price Waterhouse Coopers to fill the position of Director of Internal Audit. Tr. 524. In July, Caya gave Shirani and the Philadelphia auditors mid-term evaluations

based on five criteria: technical expertise, industry knowledge, productivity, leadership/management skills, and problem solving. RX 1. Caya decided to give everyone an official rating of "on track" because the standards were being applied retroactively. Tr. 528-530. However, she also gave Shirani specific critical feedback based on her discussion with his Arthur Anderson supervisors and her own experience with him in May, June, and July. Tr. 531. Caya told Shirani that he needed more supervisory experience and to work on financial auditing and problem solving skills. Tr. 535, 553-556, 570-574, RX. 1.

Caya's reorganization mandate was to evaluate the internal auditing arrangements Exelon had inherited from Unicom (in Chicago) and PECO (in Philadelphia), propose an internal audit department suited to Exelon's needs, and run the resultant operation. Tr. 524, 526, 537. To that end, Caya elicited the views of an audit committee and senior managers on questions such as whether to outsource the internal audit function or bring it in-house, communication protocols, reporting, and other management and staffing issues. Tr. 538. Based on this information, Caya concluded that the internal audit function should be performed almost entirely in-house, with headquarters in Chicago and offices in both Chicago and Philadelphia. *Id.* Using statistical criteria and ratios between corporate assets and revenues, Caya calculated the appropriate size for the department, number

of staff, and ratios of managers to staff. Tr. 539. Caya then developed an organizational structure that provided for a General Auditor (Caya's position) in Chicago, one director, two principal/manager auditors and 11 senior/staff auditors in Chicago, and one director, one principal/manager auditor and three senior/staff auditors in Philadelphia. RX 3; Tr. 540. Caya recommended that the senior/staff auditor salaries be graded E-4, the principal/managers be E-5s, and the directors be E-6. Tr. 540.

All of Caya's recommendations were approved except the salary levels. Tr. 541, 579, 693, 694-695. Caya's pay grade as General Auditor was E-6. Under her proposal, the Chicago and Philadelphia office directors who would be reporting to her would also be grade E-6. Company rules prohibited one E-6 from reporting to another E-6.

USDOL/OALJ REPORTER PAGE 7

Therefore, Caya had to downgrade each salary level below her one step, reducing the senior/staff auditors to E-3s. Tr. 541.[2]

---

[2] Subsequently, Caya became vice president of internal audit with an E-7 salary, and all the positions below her were upgraded one level, bringing the senior/staff auditor positions to the E-4 she had originally recommended. Tr. 576-577.

Caya developed position descriptions. Tr. 545-546. Both the senior/staff auditors and principal/manager auditors had to be competent in seven categories: business risk assessment, business process analysis, analytical skills, industry experience, oral and written communication, problem solving/logic, and adaptability/quick learning. Principal/manager auditors had to be competent in four additional categories: leadership, negotiation, interpersonal skills, and multi-tasking. RX 5, RX 7, Tr. 546-549.

Caya wanted the principal/manager auditors to have extensive experience in financial, operational, and compliance auditing and strong management backgrounds. Tr. 527. Although Caya wanted staff auditors to have professional auditing or accounting accreditation and five to eight years internal audit experience, she was willing to accept other combinations of skills. For instance, she thought Shirani's experience auditing nuclear power generation equipment for safety and compliance with legal and other requirements would add a valuable perspective for an internal audit team whose other members had more conventional accounting and financial backgrounds. Tr. 544, 547, 558.

Shirani's application for principal/manager auditor

In August and September 2001, Shirani asked both Caya and Eliecer Palacios, Exelon

director of ethics and compliance, whether he would be automatically disqualified for the E-4 principal/manager auditor position because he did not have eight to ten years financial audit experience. Caya and Palacios (after checking with Caya) both told Shirani that his lack of financial audit experience, plus the fact that he lacked management experience probably did disqualify him for the principal/manager positions but that his credentials made him a good candidate for the E-3 senior/staff auditor position. Tr. 543, 561, 594, 600.

Once Caya's merger proposal was approved, the new internal audit department had to undergo the re-staffing process that the rest of the company had undergone in 2000. Tr. 541, 583. The rules were the same: no one would be considered for a position for which he or she did not apply, and employees who submitted no applications or were not selected were automatically shunted into the severance process. Tr. 489, 545, 560, 642-643; RX 4. On October 5, 2001, Caya posted all the new internal audit positions. RX 4; Tr. 542-543. Shirani understood that he could not be considered for the E-3 staff auditor position if he did not apply for it. Tr. 489.

However, he decided not to apply for the E-3

position because he was already near the top of the E-3 salary band and because he did not want to lose the title, principal auditor. Tr. 544, 551, 651. He did apply for the E-4 principle/manager position. Tr. 490-491; RX 35. Caya did not select Shirani for an E-4 slot because she did not rate him high on analytical, negotiation or interpersonal skills or communication, problem solving, or adaptability, and because he had little financial audit or supervisory experience. RX 6; Tr. 493, 726. Instead, Caya selected two Arthur Anderson managers who had worked as contract auditors for ComEd and had strong financial audit and managerial backgrounds. Tr. 556-557. On October 26, 2001, Caya officially informed Shirani that he was not selected for a principal/manager auditor position and that in consequence his employment would be terminated effective December 26, 2001. Tr. 499; RX 33. Caya testified that neither Gillis nor anyone else told her anything about Shirani's history in SES or tried to influence her decision whether to hire Shirani as a principal/manager auditor. Tr. 561, 563-565.

DISCUSSION

The Legal Standard

Under the ERA whistleblower provision, it is unlawful for an employer to "discharge . . . or otherwise discriminate against any employee

with respect to his compensation, terms, conditions, or privileges of employment because the employee" participated in a proceeding or in any other action to carry out the purposes of the ERA or the Atomic Energy Act of 1954. 42 U.S.C.A. § 5851(a). An employee establishes a violation of § 5851 by proving by a preponderance of the evidence that (1) he engaged in protected activity, (2) his employer subjected him to an adverse employment action, (3) the employer was aware of the protected activity, and (4) the protected activity was a contributing factor in the employer's decision to take adverse action. *Hasan v. Sargent & Lundy,* ARB No. 03-030, ALJ No. 2000-ERA-7, slip op. at 3 (ARB July 30, 2004).

Where a complainant alleges that the adverse action was the prospective employer's refusal to hire him, the complainant must also establish that: (1) he applied and was qualified for a job for which the employer was seeking applicants; (2) despite his qualifications, he was rejected, and (3) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

Shirani failed to carry his burden of proof

1. Protected Activity

On the question of protected activity, Shirani contended that during the period 1997 through January 2001, he raised concerns within ComEd SES and to the Nuclear Regulatory Commission about safety deficiencies in products and processes that ComEd

USDOL/OALJ REPORTER PAGE 9

used in its nuclear power generation plants. Exelon/BSC has not argued that Shirani's complaints while in SES were not protected by § 5851. Accordingly, the ALJ deemed that element of Shirani's case admitted. R. D. & O. at 21. Because we decide this case on other grounds, we assume without deciding that Shirani engaged in activities protected by § 5851.

2. Adverse Action

With respect to adverse action, the ALJ identified two adverse actions: failure to hire Shirani as an E-4 principal/manager auditor, and termination from employment. R. D. & O. at 21-22. Again, because Exelon/BSC did not argue that Shirani was not subjected to an adverse personnel action, the ALJ deemed that element of Shirani's case admitted. *Id.* at 22. We assume without deciding that Exelon/BSC took adverse action against Shirani by rejecting him for the principal auditor position for which he applied and for terminating his employment with BSC.

3. Employer knowledge and causal connection

The ALJ concluded that Shirani failed to prove that the persons who had input into the decision not to offer him a principal auditor position were aware of Shirani's safety activities while he was employed in SES from 1997 through January 2001. R. D. & O. 23. Nor did the ALJ find any other evidence of a causal connection between Shirani's activities in SES and his non-selection at BSC. *Id.* at 26. The overwhelming weight of the evidence supports the ALJ's findings and conclusions. Therefore, Shirani's case fails and we must dismiss his complaint.

Shirani asked Gillis for a job in her financial operations in late 2000, around the time of the merger. Gillis told him the only position he might be qualified for was internal auditing. But ComEd's internal audit function was going to be merged with PECO's, and the results of the merger could be anything from a wholly-outsourced audit function to a 100% in-house organization. She would be hiring someone to create an internal audit strategy for the merged companies. Thus, Gillis was not in a position to guarantee Shirani anything other than an opportunity to learn to be a non-supervisory auditor in the ComEd unit in Chicago, to be there when incumbents would have a chance to apply for new positions should they be created, and to find out in the course of auditing what

other opportunities there might be for him in Exelon's subsidiaries.

Gillis testified that she knew from Shirani that he had been dissatisfied in SES because he wanted a promotion and salary increase that were not forthcoming there. But, she also testified, she was not aware of Shirani's encounter with Helwig at GENE or his conversations with NRC's Landsman, or any other conflicts between Shirani and his superiors while he worked at SES. None of the managers and executives who knew about Shirani's work in SES ever spoke to her about him. The ALJ made a specific demeanor-based credibility finding about Gillis' testimony. "I find Ms. Gillis to be a highly credible witness and her testimony compelling. Moreover, Ms. Gillis' testimony is supported by the evidence in the record." R. D. & O. at 24.

USDOL/OALJ REPORTER PAGE 10

Caya testified that she, too, knew nothing about Shirani's work at SES and that no one ever suggested to her that she should or should not select Shirani. Nothing in the record calls Caya's testimony into doubt.

4. Shirani's objection on review

Shirani admits that he lacked both the supervisory and financial auditing qualifications for which Caya was looking. C. O. Br. at 2; Tr.

490-491. Nor does he dispute that Caya hired applicants for the E-4 principal/manager auditing positions who met Caya's criteria. And he testified that he did not apply for the E-3 senior/staff auditor position – for which Caya had already told him he was probably qualified – because he wanted the principal auditor title and the E-4 salary range. Tr. 490-491.

Nonetheless, Shirani argues that the ALJ erred in finding that BSC rejected him for non-discriminatory reasons. Shirani contends that the ALJ focused on the wrong question. "The Complainant's unanswered complaint is based on the theory that he was terminated as part of a broad conspiracy by ComEd to cover up the safety issues raised by Complainant since 1977." C. Op. Br. at 2. "The 'lone manager theory' that one new hire [Caya] made the decision to terminate the Complainant without contact from anyone in upper management and in solitude, is too preposterous to believe and cannot be reconciled with the events of late November and early December 2000 [when Gillis offered and Shirani accepted the auditor position]." *Id.* at 6.

Shirani contends that Helwig was prejudiced against him because of the GENE exit interview and that other ComEd managers wanted to get rid of him because of his contacts with NRC through Landsman. To Shirani, the only conceivable explanation for the end of his career at BSC is that people on the nuclear side of the

business influenced Gillis to lure him over to BSC where his credentials would be comparatively weak and the reorganization could be managed so there would be no positions for which he could qualify.

Shirani's theory barely rises to the level of rank speculation. The record conclusively demonstrates that Shirani voluntarily moved from SES to BSC, refused to apply for a position for which he had been told he qualified, applied only for a position for which he concedes he was not qualified, and as a result automatically passed into the severance process. Even if Shirani had demonstrated, which he did not, that he made safety complaints at SES which angered supervisors or managers, the lack of any evidence that Gillis or Caya knew about these events absolutely precludes Shirani's claim of retaliation.

We note that even as the ALJ analyzed the record and made findings on each of the four elements of a successful complaint – protected activity, adverse action, employer knowledge, and causal connection – he also sometimes couched his discussion in terms of the prima facie case. R. D. & O. at 21, 22, 23, 26. However, once a case is fully tried on the merits, "we move beyond the question of whether Complainant has presented a prima facie case." *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 97-ERA-38, slip

op. at 9 (ARB July 31, 2002) (citing *United States Postal Serv. v. Aikens*, 460 U.S. 711, 714 (1983). Thus, we disregard the ALJ's finding that Shirani did not make a prima facie showing of failure to hire.[3]

Accordingly, we **DENY** the complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

---

[3] The ALJ also mistakenly wrote that "a complainant must show that the protected activity was the **likely** reason for the adverse action." R. D. & O. at 24 (emphasis added). However, the complainant must show only that the protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C.A. § 5851(b)(C). This misstatement of the complainant's burden is de minimis, because the ALJ's ultimate finding of fact, that Shirani's protected activity played no role in the adverse action, is supported by a preponderance of the evidence.

USDOL/OALJ Reporter

Issue Date: 30 April 2003

Case No: 2002-ERA-28

In the Matter of:

OSCAR B. SHIRANI,

Complainant

v.

COMED/EXELON NUCLEAR,

Respondents

APPEARANCES:

Michael C. McDermott, Esquire,

For the Complainant

Scott E. Gross, Esquire, and

Darren R. Reisberg, Esquire,

For the Respondents

BEFORE: ROBERT J. LESNICK

Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Procedural Background

This case arises under the Energy Reorganization Act of 1974 ("ERA" or "the Act"), 42 U.S.C. 5851 (1988 and Supp. IV 1992), and the regulations promulgated thereunder at 29 C.F.R. Part 24 ("the Regulations"). The Complainant initially filed his written complaint on February 28, 2002,[1] alleging violations of Section 211 of the ERA. The Complainant specifically alleged that he was transferred to a different position on December 1, 2000, and terminated on October 26, 2001, in retaliation for contacting the Nuclear Regulatory Commission ("NRC") on November 30, 2000.

The Occupational Health and Safety Administration ("OSHA") investigated this matter. The investigative report, dated May 24, 2002, and approved on June 3, 2002, found the Complainant's claims to be without merit. Thus, because the evidence did not substantiate the Complainant's allegation, OSHA recommended that the case be dismissed. On June 10, 2002, the Complainant filed a letter of appeal, requesting a formal hearing. This case was then assigned to the Office of Administrative Law Judges.

On October 2, 2002, the parties submitted an Agreed Protective Order, and on October 8, 2002, I issued the Protective Order. The Respondents filed a Motion for Summary

Decision on October 24, 2002. On October 28, 2002, Respondents next filed an Emergency Motion for a Protective Order Prohibiting the Deposition of Oliver Kingsley. A conference call with the parties was held, and on November 7, 2002, I issued an Order Rescheduling Hearing and Setting Briefing Schedule, to allow the parties to brief the Respondents' various motions.

The Complainant filed his Response to Respondents' Emergency Motion for 29 C.F.R. 18.15 Protective Order on November 14, 2002. On November 18, 2002, the Respondents filed their Reply Brief in Support of Their Emergency Motion for Protective Order. The Complainant then submitted his Response to Motion for Summary Decision on November 19, 2002. Likewise, on November 25, 2002, the Respondents filed a Reply Brief in Support of Their Motion for Summary Decision.

On December 4, 2002, after considering the parties' arguments, I concluded that Mr. Kingsley could offer relevant and material information and the Complainant expressed a willingness to minimize the impact of the proceeding on Mr. Kingsley's schedule. On the issue of summary judgment, I found that the Complainant had alleged the four elements of a *prima facie* case because three of the requisite elements were uncontested, and the Complainant asserted that the evidence would ultimately demonstrate a causal nexus between the protected activity and adverse action.

Moreover, there was a dispute over material facts at issue. Accordingly, I issued an Order Denying Respondents' Emergency Motion for Protective Order and Order Denying Respondents' Motion for Summary Judgment.

Subsequently, on December 9, 2002, the Respondents filed an Emergency Appeal of the Denial of Respondents' Motion for a Protective Order Prohibiting the Deposition of Oliver Kingsley with the Administrative Review Board ("the Board"). The Respondents further filed a Motion to Stay the Deposition of Oliver Kingsley and to Certify for Interlocutory Review the December 4 Order with this Court. By facsimiles dated December 9, 2002, the Complainant filed a Response to Emergency Motion to Stay the Deposition of Oliver D. Kingsley, Jr., and his Pre-hearing Report. Later that day, the Respondents also filed its Pre-hearing Memorandum. The Complainant then filed his Response to Respondents' Emergency Appeal on December 10, 2002, with the Board.

On December 10, 2002, the Board issued its Final Order Denying Emergency Appeal of the Denial of Respondents' Motion for a Protective Order. The Board noted its policy against interlocutory appeals, citing the final decision requirement in 28 U.S.C. 1291. According to the Board, the final judgment requirement mandates that appeals may not generally be heard until the trial court has issued a decision that ends the litigation on the merits. Appeals, then, should be combined in one review, to allow for

an effective and efficient appellate process when a final judgment is issued. The Board noted, however, that an exception for collateral issues is an accepted exception, permitting appeals when an issue or right is too important and independent to require deferring appellate judgment until after a final judgment is issued. The Board concluded that the Respondents had failed to present a basis for departing form the strong policy against interlocutory appeals. Accordingly, the Board denied the Respondents' emergency appeal.

The Respondents, also on December 10, 2002, filed a Motion in Limine to Exclude Certain Testimony and Evidence. The Complainant responded to the motion the next day. On December 12, 2002, I issued an Order Denying Respondents' Motion in Limine to Exclude Certain Testimony and Evidence, concluding that the testimony of Complainant's witness was relevant to his theory of the case.

A hearing was ultimately held in Chicago, Illinois on December 17, 18 and 19, 2002. The parties were given an opportunity to examine witnesses and introduce evidence. Both parties filed post-hearing briefs.

References to "CX" indicate a Complainant's exhibit. "RX" refers to a Respondents' exhibit. References to "ALJX" pertain to the exhibits of the Court. The transcript of the hearing is cited as TR and by page number. The Claimant admitted 26 exhibits into the record, numbered

CX 1, 2, 4-9, 11-15, 17, 19-23, 26-32. The Respondents admitted 40 exhibits into the record, numbered RX 1-8, 10-17, 19-22, 25-30, 32-36, 38-46. The Complainant's pre-hearing report was marked ALJX 1, and the Respondents' pre-hearing memorandum was marked ALJX 2.

The discussion and recommendations set forth in this decision are based upon my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not specifically mentioned, has been carefully reviewed and thoughtfully considered. Likewise, the findings and conclusions are based on the undersigned's observations of the appearance and demeanor of the witnesses who testified at the hearing as it affects their credibility.

Factual Background

Exelon Corporation formed as a result of the merger of Unicom Corporation, the parent company of Commonwealth Edison ("ComEd"), and Philadelphia Electric Company ("PECO"), in October 2000. (TR 664-665). Exelon Business Services Company ("Exelon BSC") is a subsidiary of Exelon Corporation. (TR 665). Exelon Generation Company ("Exelon GENCO") is the corporate entity that owns and operates the nuclear plants licensed by the NRC. (*Id.*) Exelon BSC has never owned or operated any nuclear power plants, nor does it have any licenses from the NRC. (TR 665-666).

Oscar Shirani applied for a position with ComEd, and was hired on May 21, 1990. (TR 45-46). His first job was that of a Structural Engineer in the Mechanical Structural Group. (TR 54). He held various positions, including Principal Engineer, Lead Senior Engineer, SES Specialist, Quality Assurance Administrator, and Senior Lead Auditor. In December 2000, shortly after the merger and the creation of Exelon, Mr. Shirani accepted a position with Exelon BSC. In January 2001, he moved away from the nuclear division to his new post as an Auditor for the Internal Audit department. The Complainant's employment was terminated on October 26, 2001. On February 1, 2002, the Complainant made an oral statement to the Department of Labor, and on February 28, 2002, the Complainant filed his written complaint under the ERA with OSHA.

Testimonial Evidence

Oscar Shirani

Mr. Oscar Shirani, the Complainant, is currently unemployed; however, he is trying to work as a consultant and is assisting a company by writing their quality assurance program. (TR 45). He holds Bachelor of Science and Masters degrees in Civil Engineering. (*Id.*) Mr. Shirani has 14 years of experience in civil structural design analysis, mechanical structural seismic analysis, weak link analysis, and stress

analysis. (*Id.*) He also has seven years of quality assurance audit experience. (TR 46). He was first hired by Commonwealth Edison in May 1990. (TR 45).

Mr. Shirani was hired as a Principal Engineer, and, in 1993, he was promoted to Senior Lead Engineer. (TR 67, 519). In late-1994, he joined the Quality Assurance Department with the Supplier Evaluation Services Group ("SES"). (TR 68). At the recommendation of an auditor, Mr. Shirani spoke to the SES Director, Ed Netzel; Mr. Netzel hired the Complainant, despite an absence of any openings, stating that he always needed technical people. (TR 75-76). Approximately nine months later, Mr. Shirani was promoted to Lead Auditor. (TR 78). Mr. Shirani testified that he led his first audit around autumn 1995, less than one year since he joined the department. (*Id.*)

According to Mr. Shirani, prior to 1997 he received the highest achievement award in Engineering, and recognition for outstanding achievement. (TR 86). He received promotions, from SES Specialist to Quality Assurance Administrator. (TR 93-94). In August 1997, Mr. Netzel assigned the Complainant to lead the audit of General Electric Nuclear Energy ("GENE") after the NRC sent a confirmatory letter to ComEd. (TR 95). The NRC sent the letter after discovering that the wrong parts were used. (TR 96).

Mr. Shirani testified that he sent General Electric ("GE") a letter, informing them that the audit would be taking place and explaining the scope of the review. (TR 99-100). The Complainant stated that he next asked GE "to send the jobs they had done" for the past three years, to enable the auditors to review the calculation and analyses. (TR 100). GE responded by acknowledging the size of the effort involved to amass the requested information; Mr. Shirani stated that he had the Engineering Department send GE $5,000 three months in advance to make the information available. (TR 100-101). He also said that he gave them 30 days notice prior to his arrival, summarizing the scope of the audit, citing the standards that applied, and listing the company's procedures that had already been reviewed and accepted by the auditors. (TR 101).

On August 18, 1997, Mr. Shirani and his team held the entrance meeting with GE at their San Jose, California headquarters. (TR 103). Over the course of the audit, Mr. Shirani and his team made 21 audit findings. (TR 111). Mr. Shirani described a confrontation that ensued with David Helwig at the exit meeting. (TR 112-117). The findings resulted in a stop work order, which, according to the Complainant, was approved by Mr. Netzel's boss. (TR 119). Mr. Shirani explained that the practical effect of a stop work order is to stop production after finding a significant quality assurance program

breakdown in all aspects of the sample chosen. (TR 124).

Mr. Shirani noted that he believed his audit findings were massaged in the final report, in violation of the federal regulations. (TR 454-456). He stated, however, that he assumed Mr. Netzel made the alterations, but he could not assert as much with any level of certainty. (TR 455-456).

Mr. Shirani testified that during 1998, he was asked to lead a follow-up audit of GE and was promised a team of technical specialists; however, the number of specialists was substantially reduced and the scope of his role was changed. (TR 256-257). Mr. Shirani also noted that in 1998, the SES staffing level was reduced from twelve to four. (TR 269-270). During that same time, although the overall number of suppliers decreased, the number of vendors Mr. Shirani supervised increased due to the reduction in the workforce. (TR 271).

When Mr. Shirani was preparing to return to GE for the follow-up audit, he said he received a call from a manager at the LaSalle Station, who expressed his concern that Mr. Shirani's audit would cause additional delays in the power upgrade project. (TR 336-337). The Complainant defined the power upgrade project as "increasing the thermal output of the reactors, and by increasing the power, the output to the generator to create more electricity. In another word, ... you are squeezing the metal to get more juice out of it." (TR 337). He explained that the

power upgrade program began around late-1998, and was supported by Mr. Helwig and Mr. Kingsley. (TR 337-338). General Electric was heavily involved in ComEd's power upgrade projects. (TR 338).

Mr. Shirani discussed generally some of the audits he performed for ComEd. He also noted that during the merger period, he was conducting audits, but he was also applying for positions within the new company. (TR 358). He was allowed to nominate himself for four positions, which he did; he was also able to ask a supervisor for two additional nominations. (TR 360). Accordingly, Mr. Shirani stated that he asked Mr. Bastyr to nominate him for two positions, out of a list of four or five possibilities, including some outside SES. (TR 361). However, the Complainant asserted that Mr. Bastyr did not nominate him for the requested positions. (TR 413; CX 31). Mr. Shirani testified that none of the four self-nominated positions, or the positions given to Mr. Bastyr, were related to internal audit in any way; in fact, he stated that he was unaware of what "business services" meant, or that the company had an internal audit department. (TR 362).

During his time on an audit for Holtec/U.S. Tool & Die in Pittsburgh, Pennsylvania, Mr. Shirani stated that he was hampered in completing his tasks. For instance, on the first day of the audit, he said he received a call from Tom Joyce's office, telling him to report to Philadelphia to meet with the President of Exelon BSC. (TR 364).

The Complainant said he was to be interviewed for the position of Vice President of Supply, despite not applying for the position. (TR 366-367). He was unaware if someone nominated him for the position. (TR 473). In Mr. Shirani's absence, several members of his team received a call to work on another project. (TR 368). The group ultimately had to return at a later date to complete the audit. (TR 369).

While he was writing his audit report, Mr. Shirani was told that he was going to interview for the position of SES Manager. (TR 370). Mr. Shirani again stated that he had not applied for this position, nor was he aware that the position was open. (TR 371). At that time, the position was held by his boss, Mr. Bastyr. (TR 372). After his interview, Mr. Shirani said he was called to the Human Resources Department, where he had a phone interview with someone from PECO for about four minutes. (TR 373-376). Mr. Shirani also interviewed for Director of Supply for Exelon BSC, a job for which he said he did not apply. (TR 376-377).

Mr. Shirani stated that he thought these interviews were related to his contacts with Ms. Gillis or Mr. Clark. (TR 381). Mr. Shirani said that he explained his frustration in not moving up the ladder in the nuclear division to Ruth Ann Gillis and Frank Clark; he asked them to mentor him and help him find a leadership role in Exelon. (TR 378-380, 476). The Complainant said that on December 7, 2000, Ms. Gillis discussed several possibilities, and ultimately

offered him a job as an Internal Auditor. (TR 387-390). He further said that Ms. Gillis called him again on December 13, just prior to her vacation, to let him know how to contact her while she was away. (TR 392). Mr. Shirani stated that he never called her, but she called him on December 19, attempting to convince him to accept a position with her and reject a position in nuclear as Diversity Manager. (TR 393-394).

Mr. Shirani said that he ultimately took himself out of consideration for the position in the nuclear division, accepted Ms. Gillis' offer, and moved to Exelon BSC in mid-January 2001. (TR 396). He held that position until he was terminated on October 26, 2001, and removed from the office four days later. (TR 397-398). During his time at Exelon BSC, Mr. Shirani stated that he made several attempts to return to Exelon Nuclear. (TR 399).

According to Mr. Shirani, he did not speak to Mr. Helwig in person or via telephone, nor did he seek career advice from Mr. Helwig. (TR 403). However, Mr. Shirani did ask Mr. Helwig to mentor him, and explain why he was not selected for certain positions in the merger. (TR 466-467; RX 42). The Complainant said that he invited all of the company executives to a dinner, and all who attended, except Mr. Helwig, shook his hand. (TR 404-405).

Mr. Shirani stated that he had a meeting with Oliver Kingsley on October 6, 2000, during which he gave Mr. Kingsley documents relating

to his GE audit. (TR 406-407). Mr. Shirani further stated that he left this meeting with a positive impression. (TR 407). During the next year, Mr. Shirani wrote a letter to Mr. Kingsley, asking to return to the nuclear division. (*Id.*) Mr. Shirani said that he received no reply from Mr. Kingsley (*Id.*); however, Rich Lundy responded on Mr. Kingsley's behalf, and explained the lack of vacancies and remote possibility of any opportunities. (TR 407-409; CX 28).

On cross examination, Mr. Shirani noted that Mr. Bastyr frequently acknowledged that the Complainant was his best auditor. (TR 434-435). Similarly, after the GE audit, Mr. Shirani became the lead auditor on ComEd's problem vendors, and remained a contributor until he left the department in January 2001. (TR 436, 438).

During the Complainant's time at Exelon BSC, he worked as an auditor under the supervision of both Ms. Gillis and Exelon's contract audit firm, Arthur Anderson. In April 2001, Ms. Gillis hired Ellen Caya to serve as both General Auditor and the point person for restructuring the Internal Audit department. On October 2, 2001, Mr. Shirani received an e-mail from Ellen Caya describing the restructuring process for the Internal Audit department, and explaining that, in order to be considered for any position, he had to apply. (TR 489; RX 4). In this period of restructuring, Mr. Shirani admitted that the only position he applied for was the Principal Audit Manager position. (TR 490; CX 23; RX 35). He believed he was applying for the position

because it had the same title as the position Ms. Gillis hired him for in December 2000. (TR 490-491). The Complainant further stated that he could not apply for any of the higher positions because he did not meet any of the requirements and the salary of the lower job classifications was close to his current salary at that time. (TR 491).

Ross Landsman

Dr. Ross Landsman holds a Ph.D. in civil engineering and has worked as an engineer with the NRC for 23 years. (TR 13-14). He is employed as a Project Engineer in the Decommissioning branch of the Division of Materials and the Region 3 Coordinator for Dry Cask Storage, Dry Field Storage. (TR 14). Dr. Landsman's position includes the task of ensuring that utilities follow the regulations that apply to dry cask storage of spent nuclear fuel. (TR 16). He testified that he met the Complainant years earlier, but most recently in November 2000, at a Holtec users' group meeting. (TR 16-17). According to Dr. Landsman, at that group meeting, Mr. Shirani asked questions regarding some items that remained uncorrected two years after he completed his audit. (TR 17-18).

After the meeting, Dr. Landsman testified that he asked Mr. Shirani for a copy of the audit report and was told he would have to go through official channels. (TR 18). Upon receiving the audit report, Dr. Landsman noted that, based on

the results, U.S. Tool & Die, the subcontractor that built the storage casks for Holtec, were not building the casks according to NRC specifications. (TR 23). He thus called some associates from the NRC's Washington, D.C. office to conduct a vendor audit. (TR 22). However, these people were not interested in the issues presented to them. (TR 30). During subsequent telephone calls with Mr. Shirani, Dr. Landsman learned of an audit of Omni, another subcontractor that did some fabrication for Holtec. (TR 24-25).

Dr. Landsman read the reports and testified that when he asked Mr. Shirani why he did not stop the work, the Complainant responded that he was afraid of losing his job. (TR 25-26). On cross examination, Dr. Landsman stated that when employees have safety concerns, they should report them to their supervisors. (TR 34). If the employees do not get satisfaction from their management, then they should raise the issue with the NRC. (*Id.*)

Walter Hahn

Mr. Walter Hahn is an engineer currently working as a Supply Director at Ontario Power Generation, Ontario, Canada. (TR 139). He was employed by Commonwealth Edison from October 1994, until December 2000, during which time he held multiple positions. (*Id.*) Mr. Hahn reported to Tom Joyce; Mr. Joyce's process for employee performance reviews, including an annual meeting with his direct

reports, during which they would discuss employees' grade levels, merit pay increases, and promotions. (TR 141). According to Mr. Hahn, Russell Bastyr praised the work of Mr. Shirani, stating that Mr. Shirani was his best auditor. (TR 142). Mr. Hahn testified that Mr. Bastyr recommended Mr. Shirani be promoted to a higher level, but Mr. Joyce replied that such a promotion would not be accepted. (*Id.*)

Ann Harris

Ms. Ann Harris is currently unemployed, and her last full-time employment was with the Tennessee Valley Authority ("TVA"). (TR 145). Ms. Harris began working for the TVA as a Clerk at the Watts Bar Nuclear Plant in 1982, and worked her way up to Engineering Aid in electrical engineering in 1984. (TR 146-147). From 1986 until 1988, she served as Assistant Unit Supervisor for electrical engineering; during that time she was on a team that reviewed complaints regarding plant safety. (TR 148-149). Of the approximately 8,000 complaints received, about 2,300 dealt with "managements tactics." (TR 149). Beginning in late 1986, and continuing off and on, Ms. Harris worked on a team called "Corrective Action for Employee Concerns," which was designed to deal with some of these employee concerns. (TR 150).

Ms. Harris testified that her work environment had grown to be unfriendly. (TR 154-155). During mid-1990, she met Oliver Kingsley, TVA's President for Nuclear Power, in the hallway of

the records building; they had a conversation, after which he invited her to Chattanooga, Tennessee, to discuss her concerns in more detail. (TR 155). Ms. Harris subsequently went to Chattanooga and spoke with Mr. Kingsley about issues that needed to be addressed. (TR 156). As a result, Ms. Harris had a series of meetings with representatives from the Human Resources department, including a top personnel official and the head of employee concerns for Watts Bar, ultimately reaching a settlement agreement of both her complaints and substantive issues at the plant. (TR 157-158).

According to Ms. Harris, prior to Mr. Kingsley, conditions at the plant were lax, and many believed he was going to improve those conditions. (TR 159). However, the number of complaints grew, employees who raised issues were terminated, and the quality assurance program was rewritten. (TR 164). Ms. Harris left TVA in September 1997. (TR 166).

Kombiz Salehi

Mr. Kombiz Salehi is currently employed by a technology company that manufactures semiconductor devices and as an instructor at the University of Phoenix, in San Jose, California. (TR 284-285). Mr. Salehi testified that he was recruited to ComEd in 1971, directly after receiving his Masters degree, and he was assigned to work as a reactor engineer at a nuclear power station. (TR 285). Subsequent to

that, he worked in the nuclear industry for several employers, including a company he founded, and the NRC. (TR 285-286). He returned to ComEd in 1997, and remained there until he was laid off in mid-1998. (TR 286).

During this second period of employment with ComEd, Mr. Salehi was employed as the Engineering Assurance Group Supervisor. (TR 295). In that capacity, his duties included coordinating the engineering assurance activities of ComEd's six nuclear power stations. (*Id.*) The purpose of this position was to create independent oversight to monitor engineering activities at the nuclear plants. (TR 297). In this capacity, Mr. Salehi met with David Helwig, who was then working at GE Nuclear, regarding a stop work order that resulted from Mr. Shirani's team audit, which was affecting ComEd's operation of its plants. (TR 305-308). According to Mr. Salehi, Mr. Helwig was unhappy about the manner in which the meeting was arranged, and with Mr. Salehi's substantive presentation. (TR 312-314).

When Mr. Helwig joined ComEd, he was employed as a vice president, overseeing engineering. (TR 321). Mr. Salehi then testified that the engineering assurance group was essentially dissolved. (TR 322). For example, in early 1998, the department had a comparable number of assignments to the previous year, but had a reduced number of staff. (*Id.*) Beginning around November 1997, the staff of five was reduced by reassignments and layoffs. (TR 323-

324). The reassignments and layoffs continued through 1998, ending with Mr. Salehi's layoff. (*Id.*)

David Helwig

Mr. David Helwig came to ComEd in 1998 from General Electric, and is currently working for Infrasource Corporation, a subsidiary of Exelon Corporation. (TR 174). During his time as a Vice President at ComEd, he was responsible for all corporate office functions that supported the operating nuclear plants. (TR 176). During that time, he was also responsible for approximately 2,000 employees; however, according to Mr. Helwig, the Complainant was not one of those employees, nor was the witness responsible for the Quality Assurance department. (TR 177-178). Mr. Shirani first came under Mr. Helwig's supervisory chain around June 1999, during an organizational realignment. (TR 178-179; RX 10). Around late-November 2000, Mr. Helwig testified that he became Executive Vice President of ComEd Operations, and no longer had any responsibilities over the nuclear arena or Mr. Shirani. (TR 181-182).

According to Mr. Helwig he never had any direct role or specific input into the Complainant's performance evaluations during the time that Mr. Shirani was in his supervisory chain. (TR 183). Similarly, Mr. Helwig stated that he did not have any role or participation in the 2000 restaffing process with regards to Mr. Shirani. (TR 185). When asked specifically, he also stated

that he never had a discussion with Ms. Gillis about the Complainant, nor did he suggest or direct her to try to convince Mr. Shirani to leave the nuclear division. (TR 186).

Mr. Helwig testified that within the first month after coming to ComEd in 1998, he sought out Mr. Shirani to let him know that there were no feelings of ill will. (TR 186-187). He also noted that subsequent conversations were initiated by Mr. Shirani, who sought the witness out for professional/career advice. (TR 187). In one of these conversations, Mr. Helwig stated that he cautioned the Complainant to carefully consider a potential move to the financial area of the company, based on his limited credentials and experience with such matters. (TR 189). Moreover, he stated that he never asked Ms. Gillis, Ms. Caya, or anyone else not to select the Complainant for any position in Exelon BSC. (TR 192). Likewise, he testified that he was unaware that Mr. Shirani left Exelon BSC until after the fact, and he never asked, suggested, or directed anyone to terminate the Complainant.

The witness then testified about his time with General Electric. During his tenure, there were frequent audits by customers, however only the audit led by Mr. Shirani resulted in a stop work order. (TR 194). Mr. Helwig discussed some of the presentations he made in 1997 regarding quality issues at GE, including some of the same issues reported by Mr. Shirani in the ComEd audit. (TR 194- 204; RX 27, 28). Mr. Helwig also developed a presentation that addressed the

specifics of the ComEd audit and subsequent stop work order. (TR 204-206; RX 29). According to Mr. Helwig, he accepted the findings of Mr. Shirani's audit because many of the problems had already been recognized in-house and were being addressed. (TR 206-212).

On cross-examination, Mr. Helwig acknowledged that he emphatically disagreed with Mr. Shirani at the GE audit exit interview. (TR 227). Thus, when he joined ComEd, Mr. Helwig stated that he sought out the Complainant to make sure there was no ill will. (TR 226).

Eliecer Palacios

Mr. Eliecer Palacios is currently serving as Exelon Corporation's Ethics and Compliance Director, a position he has held since 1998. (TR 590-591). In this position, Mr. Palacios is responsible for developing compliance programs to address areas of risk within the corporation, as well as developing policies for and enforcing the company's code of business conduct. (TR 591). He testified that on September 5, 2001, he had lunch with Mr. Shirani, at which the Complainant raised his concerns regarding some of the requirements for the position in internal auditing. (TR 591-592).

Mr. Palacios stated he talked to several people regarding Mr. Shirani, including Tom Joyce, who stated that nobody wanted to see Mr. Shirani leave the nuclear department. (TR 596). Likewise, he spoke with Jerry Ellis, HR Director

for nuclear, who conveyed the same message that he sent to Mr. Shirani in an e-mail, which stated that due to a workforce reduction, they did not have a position for him in that department. (TR 596-597; RX 32). Mr. Palacios testified that he had contacted Mr. Ellis to find out if any issues of retaliation existed in Mr. Shirani's records. (TR 597). Mr. Palacios also spoke to Ellen Caya, who stated that Mr. Shirani would be considered for any position he applied for, and he would not be eliminated because he did not meet the ten years of experience requirement. (TR 594-595, 602).

Kevin Yessian

Mr. Kevin Yessian is the Vice President of Supply for Exelon GENCO, a position he has held since September 2000. (TR 608). He is responsible for meeting all of the service and materials requirements for Exelon GENCO, including .3 billion in annual purchases. (TR 609). Mr. Yessian testified that, within his first weeks with the company, he met the Complainant. (*Id.*) Approximately one or two months later, Mr. Shirani approached him and indicated an interest in joining the finance organization because he was interested in advancing in the company. (TR 610). Mr. Yessian stated that he advised Mr. Shirani on the different skill sets required between finance and supplier evaluation. (*Id.*) During that conversation, Mr. Yessian also informed Mr. Shirani that if he left, the position would not be filled because the witness intended to reduce the size of the

supplier evaluation group. (TR 611). For approximately two months, Mr. Yessian reported to Mr. Helwig; during that time, neither Mr. Helwig, nor anyone else, ever asked or suggested any particular action against Mr. Shirani. (TR 612).

On cross-examination, Mr. Yessian reiterated that when Mr. Shirani approached him about taking a position with Ms. Gillis, he cautioned the Complainant because of his skills and experience in the nuclear division. (TR 625). Mr. Yessian testified that when he believes a position is not an ideal fit, he does not discourage or encourage employees from seeking opportunities. (TR 626-627). On recrosss, Mr. Yessian stated that he made the decision to downsize the department in October, and told Mr. Shirani in November, however, the witness could not remember when, or if, he told any other employees of his decision. (TR 628-629). Mr. Yessian also stated that he did not tell Mr. Shirani how he intended to downsize. (TR 632-633). Ultimately, most downsizing occurred through attrition, however, one person was removed. (TR 633).

Martha Garza

Ms. Martha Garza is the Human Resources Manager for Exelon BSC, a position she has held since the corporate merger, in October 2000. (TR 634-635). Her responsibilities include internal and external recruiting, performance management, succession planning, and

leadership development. (TR 635). During the fall 2001 restructuring of the Internal Audit department, Ms. Garza provided support for Ms. Caya and was responsible for internally posting jobs, scheduling interviews, and coordinating all activities for a hiring manager. (TR 640).

According to Ms. Garza, Mr. Shirani called her the night before the available positions were posted and expressed concern about his qualifications in relation to the outlined criteria. (TR 641). Ms. Garza stated that she encouraged him to apply and go through the interview process anyway because an interview allows an applicant to market himself and address any shortcomings or other relevant criteria. (TR 641-642). Ms. Garza further testified that she encouraged the Complainant to apply for those jobs he thought he was qualified to do after he asserted that he would not be applying for certain jobs because he did not want to take a reduction in pay or a demotion. (TR 642).

Mr. Garza testified that applicants would be considered for any position they applied for, however, no one was considered for positions to which ~~they~~ did not apply. (TR 642-643). On October 26, 2001, Ms. Garza and Ms. Caya met with Mr. Shirani to inform him that he had not been selected for the only position for which he applied, and that he was consequently eligible for merger severance benefits. (TR 643).

Mr. Shirani subsequently sent an e-mail to several company officials on October 30, 2001

(RX 21), and as a result, Ms. Garza and Ms. Caya immediately arranged a meeting with the Complainant. (TR 645). The meeting occurred later that day, to convince the Complainant to transition his work to other members of the Internal Audit department. (TR 646). Ms. Garza testified that Mr. Shirani became "belligerent and confrontational," and refused to leave; ultimately, Ms. Caya called security to remove him. (TR 647). Immediately after the meeting, Ms. Garza prepared notes to reflect the events of the meeting. (TR 645-646, RX 22). Ms. Garza testified that she was unaware of Mr. Shirani's work or activities during his tenure in the nuclear division and no one directed, suggested, or asked her to fire the Complainant. (TR 648).

Ms. Garza noted that prior to the reorganization, Mr. Shirani was in the E-4 pay band, earning an annual salary of approximately $97,000. (TR 662; CX 19). As such, he was around the middle of the new E-4 pay band, with a maximum annual salary potential of $126,000. (TR 662, RX 20). Thus, Mr. Shirani would have been going from a higher pay band to a lower one, had he applied for the E-3 position of Senior Auditor. (TR 662). Similarly, had the Complainant applied for the E-3 position, he would have already been close to the maximum salary for the E-3 pay band. (TR 662-663).

Ruth Ann Gillis

Ms. Ruth Ann Gillis is the President of Exelon BSC and a Senior Vice President of Exelon

Corporation. (TR 664). Ms. Gillis first testified about the company's structure, Exelon's various entities and subsidiaries, and her positions with Exelon and previously Unicom. (TR 664-666). She noted that during her time as Chief Financial Officer of Exelon Corporation, her responsibilities included financing, cash management, managing the internal reporting of financial results, tax, internal audits, and financial risk management. (TR 666).

The witness testified that she first met Mr. Shirani when she served as the executive sponsor for an employee network group affiliated with the Asian American ComEd Society, which later became Asian American Community under Exelon ("AACES"). (TR 667-668). Mr. Shirani was the first President of AACES. (TR 668). According to Ms. Gillis, she typically spoke with the Complainant twice per month, generally about AACES business; however, they often discussed Mr. Shirani's position in the company. (*Id.*) During one particular encounter at an AACES event called "Taste of Asia", Ms. Gillis stated that Mr. Shirani told her he was disappointed and frustrated that he was not receiving what he felt to be adequate and appropriate recognition for his expertise and experience. (TR 669). Ms. Gillis further stated that she advised him to be very clear about his goals regarding his career and addressed his interest in being a manager. (TR 670). She also recommended that the Complainant consider how much time he spent as President of AACES, which was a volunteer

position and not directly job related. (TR 670-671).

Ms. Gillis noted that, prior to leaving the nuclear division, Mr. Shirani complained about the lack of recognition, lack of promotion, and lack of opportunities to take on a managerial role. (TR 672-673). Similarly, the Complainant wanted to do what was best for Exelon. (TR 673). According to Ms. Gillis, at no time did Mr. Shirani tell her that the nuclear division was trying to force him out. (*Id.*) However, Mr. Shirani sent an e-mail to Ms. Gillis, which she interpreted as a request for help in getting a job. (TR 674; RX 8). Subsequently, during the time of the merger, in autumn 2000, Ms. Gillis testified that she met with Mr. Shirani, and he asked her for a job in the finance organization, hoping for more opportunities to realize his goals and contribute more to the company. (TR 675). Ms. Gillis stated that she was initially unsure because she did not see a correlation between her department and the Complainant's experience, but she informed him that she would consider his request. (TR 676).

At the meeting with Mr. Shirani, Ms. Gillis testified that she described the status of her division, including that she was hiring a general auditor, who would be responsible for rebuilding the internal audit area. (TR 677). Ms. Gillis also testified that she worked with Human Resources to see if she could develop an opportunity to meet Mr. Shirani's objectives. (TR 679). The witness noted that she never suggested the

position of Tax Manager because tax is such a specialized area and the Complainant did not have the necessary background; however, she continued to look for or create a position for him because she appreciated his interest and passion for wanting to improve his career while supporting the company. (TR 679-680).

According to Ms. Gillis, she offered Mr. Shirani a position in December 2000, shortly before she left for vacation. (TR 680-681). While the internal audit department was not yet formed, she proposed that he could work with Arthur Anderson through the development phase. (TR 681). After some discussion about the compensation package, Mr. Shirani communicated his acceptance of the offer to Ms. Gillis while she was on vacation. (TR 685).

Ms. Gillis testified that the Complainant informed her that he had applied for the position of Diversity Manager; thus she knew of his interest in that position. (TR 685-686). However, she learned from Human Resources that, although Mr. Shirani had applied, contrary to his belief, he was not the leading candidate; in fact, the company had not yet narrowed the field of candidates and was still interviewing. (TR 686). Ms. Gillis stated that she never told the Complainant that Mr. Kingley did not support diversity. (TR 688). Moreover, Ms. Gillis testified that she had no knowledge or any reason to believe that anyone in the nuclear division was attempting to get rid of Mr. Shirani; she stated

that she never spoke with anyone in the nuclear division about his job. (*Id.*)

During the Complainant's first few months on the job, Ms. Gillis stated that she received feedback from Arthur Anderson, in which his supervisors expressed concerns with his understanding of his responsibilities and his giving unsolicited advice to audited clients. (TR 690). Ms. Gillis said that she suggested he be more sensitive to his clients' needs and receptivity towards advice. (TR 691). Otherwise, Ms. Gillis found that Mr. Shirani was on course and progressing in the job. (*Id.*)

In April 2001, Ms. Gillis hired Ellen Caya as the General Auditor to create the internal audit strategy and develop the organizational structure of the department. (TR 693). Ms. Gillis noted that she did not direct or suggest to Ms. Caya who should fill any of the manager positions. (TR 695). Specifically, she stated that she did not direct or suggest that Ms. Caya not hire Mr. Shirani for that position. (TR 696). Likewise, Ms. Gillis said that she had no role in the decision to terminate Mr. Shirani. (*Id.*) According to Ms. Gillis, the protocol for terminating employees who had either bid on jobs and not been selected or not bid on positions was a part of a process, overseen by Ms. Caya. (*Id.*) Ms. Gillis testified that while she knows Mr. Helwig, Mr. Kinglsey and Mr. Yessian, none of them, or anyone else in the nuclear department, directed, suggested or asked her to

take any action regarding the Complainant. (TR 696-697).

On cross-examination, Ms. Gillis stated that she did not make any promises about Mr. Shirani becoming a manager, nor did she discuss the stress level of the job with him. (TR 720). Moreover, she was unable to provide the Complainant with a job description or a reporting chain of command, and she could not have a managerial relationship with him because of the rest of her responsibilities. (TR 720-721). Finally, Ms. Gillis testified that she was unaware of Mr. Shirani's reputation in the company, including any derogatory nickname that referred to a penchant for shutting down facilities. (TR 722).

Ellen Dee Caya

Ms. Ellen Caya was hired by Exelon on April 23, 2001, and currently serves as Vice President of Internal Audit with Exelon BSC. (TR 524). Prior to her promotion in January 2002, she was employed as the Director of Internal Audit; in that capacity her responsibilities included defining the strategic direction and implementing a strategic plan for the department. (TR 524-525). When she was hired by Exelon, she had six people in Philadelphia, and Mr. Shirani in Chicago, who reported to her; she reported directly to Ruth Ann Gillis. (TR 525-526). According to Ms. Caya, Mr. Shirani's duties as a Principal Auditor were to complete part of the audit plan, financial operation work,

compliance audits, and generally be part of the audit team. (TR 526). None of the department's work involved nuclear safety audits. (TR 527).

Overall, Ms. Caya opined that Mr. Shirani did a good job in his Internal Audit position. (TR 528). In his first work appraisal, Ms. Caya noted that the Complainant needed to increase his financial skills. (RX 1). She explained that he had not had much experience in this area, and if he wanted to continue his growth in the audit department and overall career development, he would need experience completing different types of audits. (TR 532). Also during this appraisal, Ms. Caya indicated that Mr. Shirani had difficulty staying focused on the issues and his listening skills needed improvement. (TR 535; RX 1).

Approximately July or August 2001, Ms. Caya began developing her proposal for the Internal Audit department, which recommended developing the department in-house in both Philadelphia and Chicago, and staffing it according to needed skill sets and the changing business environment. (TR 538). To staff the redesigned positions, Ms. Caya stated that she used an internal process used by every department that had gone through a "deselection-selection process" as a result of the merger. (TR 541). She drafted job descriptions for each position and posted them on the internal Human Resources placement system. (*Id.*) On October 2, 2001, Ms. Caya sent an e-mail to her employees regarding the Internal Audit department's restructuring plan. (RX 4).

On cross-examination, she added that under a "deselection-selection" process, every individual had to reapply for his or her position. (TR 583).

According to Ms. Caya, between his July evaluation and the October 2 e-mail, Mr. Shirani spoke with her several times and expressed his interest in a manager position. (TR 543). Ms. Caya stated that she told him that he should apply for the position of Senior Auditor because it was unlikely he would be selected as a manager. (*Id.*) She then stated that he rejected her suggestion of the Senior Auditor position because the salary was not high enough. (TR 544).

Ms. Caya noted that the deadline for submitting applications was October 16, 2001. (*Id.*) A person could not be considered for a position to which he or she did not apply. (TR 544-545). Positions that remained open after the internal process was completed would be assessed and filled externally. (RX 4). For the position of Principal Audit Manager, Ms. Caya explained that a manager candidate had to have supervisory experience; likewise, those chosen needed to have "a full depth and breadth of auditing," including experience in financial, operational and compliance auditing. (TR 546-547). However, not all of the position requirements listed in the posting were absolute prerequisites to be selected because an applicant would be evaluated on experience and ability. (TR 547; RX 5). "Core competencies," such as

those listed as technical and enabling competencies, were required. (TR 548; RX 2,5).

Ms. Caya testified that she was the sole decision-maker in determining the manager's job duties. (TR 548). Similarly, she stated that she was the sole decision-maker is selecting a manager. (*Id.*) Ms. Caya said that neither Ms. Gillis, nor anyone else, ever directed, suggested or asked her to put a particular person in the manager's position. (TR 548-549). Likewise, Ms. Caya further noted that no one ever directed, suggested or asked her not to select Mr. Shirani as a manager. (TR 549).

After Mr. Shirani's interview on October 22, 2001, Ms. Caya stated that she completed a candidate assessment form. (*Id.*; RX 6). According to Ms. Caya, she again explained to Mr. Shirani that it was unlikely he would get the manager's position; she also inquired as to why he had not applied for the position of Senior Auditor. (TR 551). Allegedly, Mr. Shirani responded that the salary was not high enough. (*Id.*) In both her notes and her testimony, Ms Caya explained that she did not select Mr. Shirani for the manager position for several reasons, including his: Limited financial and compliance auditing experience; limited supervisory experience, which was not recent; strong verbal communication skills, but improvement needed on his written communication skills; tendency to be confrontational; and failure to explain why he

met the required competencies. (TR 552-556; RX 6).

Ultimately, Darren Zurowski and Marcos Kushkov were chosen for the manager positions. (TR 556). According to Ms. Caya, Mr. Zurowski had his MBA, was a CPA and a CIA, and had 11 years of experience in public and private accounting, including directing work at ComEd, and years of experience with several utilities in Chicago. (TR 556-557). He also had supervisory experience, leading employees at Arthur Anderson. (TR 557). Mr. Kushkov was a CPA, also with both public and private auditing experience, experience in financial, operational and compliance auditing, as well as some supervisory experience. (*Id.*)

Ms. Caya stated that she and Ms. Garza met with the Complainant on October 26, 2001, to inform him that he was not selected as a manager. (TR 561). Ms. Caya further stated that the decision to terminate Mr. Shirani was hers; again she noted that no one, including Ms. Gillis, ever asked, suggested or directed her to terminate Mr. Shirani. (TR 561-562). Ms. Caya and Ms. Garza again met with Mr. Shirani on October 30, 2001. (TR 562). Ms. Caya testified that, after she repeated the job criteria and the correlation to Mr. Shirani's experience, he became upset and vocal, "ranting and raving" about a conspiracy against him. (TR 562-563). Ms. Caya said that she believed that Mr. Shirani was getting very angry, which concerned her, so

she left the meeting and called security. (TR 563).

With regard to the position of Senior Staff Auditor, there were 11 openings in Chicago, one of which was filled, and 5 slots available in Philadelphia, two of which were filled in this internal selection process. (TR 559). After this selection process concluded, there were three incumbents in Philadelphia who were not selected for their positions. (TR 560). According to Ms. Caya, they were not considered for any positions for which they did not apply, and they were offered the same separation package offered to Mr. Shirani. (*Id.*)

Ms. Caya concluded her direct testimony by noting that Mr. Shirani had previously told her he had done an audit of GE and it was not favorably received. (TR 564-565). However, according to Ms. Caya, she has never spoken to Russ Bastyr, David Helwig, Oliver Kingsley, or anyone else in Exelon Nuclear about Mr. Shirani and none of those individuals directed, suggested or asked her to take any particular action with respect to Mr. Shirani. (TR 563-564).

Russell Bastyr

Mr. Russell Bastyr is the Supplier Evaluation Services Manager for Exelon GENCO, Nuclear Division, and is responsible for supervising a group of auditors to oversee suppliers of safety related products for the nuclear division. (TR 735-736). He first explained that the Employee

Concerns Program began because employees at the Braidwood Generating Station did not have the opportunity to raise issues, particularly during their employment, or they feared losing their jobs for raising safety issues. (TR 737). ComEd thus created the program to allow employees to identify nuclear safety issues at that site without fear of retaliation or retribution. (TR 737-738). Through advertising campaigns, Mr. Bastyr stated that the company has encouraged employees to raise nuclear or safety concerns. (TR 739).

Mr. Bastyr testified that he first supervised the Complainant in September 1997; the witness took the job over for Paul Zurowski, who later returned and worked for Mr. Bastyr in 1998. (*Id.*) In June 1999, under the direction of new management, ComEd underwent a realignment, during which everyone had to reapply for their jobs. (*Id.*) The purpose of Supplier Evaluation Services ("SES") is to contact suppliers and, through an audit and annual evaluations, verify that their quality assurance program meets NRC requirements under 10 C.F.R. 50. (TR 742). The purpose of the audits is to identify problems with suppliers' programs, verify with reasonable assurances that proper parts are being used, and ensure that the parts meet their safety standards and will perform as intended. (TR 743). Mr. Shirani's duties, according to Mr. Bastyr, included performing audits, participating as a member on some and leading others, planning audits, visiting vendor sites, and

looking for technical specialists to join him on the audits. (*Id.*) When the Complainant lead an audit, Mr. Bastyr's role was to review the audit, approve the audit plan, approve the actual audit, approve corrective actions, and generally supervise Mr. Shirani. (TR 744). Mr. Bastyr was held personally responsible for the quality of his auditors' work. (*Id.*)

When a vendor had significant problems, Mr. Bastyr, as a manager, could issue a stop work order if the auditors found the general process, or continuing the work, would have a detrimental impact the final product, or if the quality assurance program was not indicating that a part would perform as designed. (TR 746-747). Since September 1997, Mr. Bastyr estimated that the department has averaged 15-16 audits per year; during that time, most audits yielded formal findings, but only one stop work order had been issued. (TR 748-749). Mr. Bastyr stated that the person who wrote the audit recommending the stop work order remained an auditor with Exelon Generation Company until late-1999 or early-2000, when he sought an opportunity to move closer to his home. (TR 750-751).

According to Mr. Bastyr, the Complainant was one of his top performing auditors, particularly because of his technical knowledge and thoroughness. (TR 755-756). The witness noted that he gave Mr. Shirani the highest rating that he gave any employee for 1999. (TR 757; RX 12). He further noted that he enrolled Mr. Shirani

into "Situation Development," a course designed to teach techniques in supervising employees with different levels of experience. (TR 758). In 2000, Mr. Shirani's rating from Mr. Bastyr was lower, particularly in the areas of personal drive and integrity/trust. (TR 760-761; RX 13). According to Mr. Bastyr, the lower rating reflected that the Complainant was out of the office without informing Mr. Bastyr where he was going, which could have been problematic if he was needed. (TR 761). Likewise, in Mr. Bastyr's opinion, Mr. Shirani focused too heavily on self-promotion, rather than the needs of the group, and his performance suffered. (*Id.*)

After the merger, Mr. Bastyr was selected as SES Manager for Exelon GENCO, Nuclear Division. (TR 763). During the merger staffing process, Mr. Bastyr stated that he nominated Mr. Shirani for his own position, nuclear oversight, and he spoke with "people" about a possible supervisory position in engineering. (TR 764). Contrary to Mr. Shirani's request for two nominations for positions outside of nuclear, Mr. Bastyr did not nominate him for any such positions. (TR 767-768; CX 31). Mr. Bastyr explained that he nominated the Complainant for positions internally to the nuclear division because it is a specialized field and requires people with special training and skills. (TR 768, 812). Similarly, he believed that Mr. Shirani's experience made him a better candidate for positions in the nuclear division, and he added value and best served the company in that arena. (TR 768).

Mr. Bastyr stated that he made selection decisions for auditors under his position during the restaffing process; he selected Mr. Shirani to remain an auditor, while he rejected other candidates. (TR 768-771). Through the process, Mr. Bastyr met with Mr. Shirani a few times. On one occasion, Mr. Shirani stated that he would stay on as an auditor if that was the only job available. (TR 769). On a subsequent occasion, however, Mr. Shirani expressed dissatisfaction with his lack of advancement, and asked for a voluntary separation package, which, as Mr. Bastyr explained, was not allowed. (TR 769-770). Mr. Bastyr testified that he subsequently helped Mr. Shirani apply for two positions outside of the division: Diversity Manager and a position in Ms. Gillis' financial organization. (TR 771-773).

According to Mr. Bastyr, no one, including David Helwig or Tom Joyce, ever directed or asked him to convince Mr. Shirani to leave the nuclear division. (TR 774). Similarly, the witness testified that he never had a conversation with either Ms. Gillis or Ms. Caya about Mr. Shirani. (TR 774-775). Mr. Bastyr discussed several audits Mr. Shirani had either led or been a member of, including the Holtec/U.S. Tool and Die and GE audits. He stated that he never requested, nor had anyone asked him to request, Mr. Shirani alter his findings. According to Mr. Bastyr, Mr. Shirani's performance on his follow-up audit of GE was thorough, and a result, Mr. Bastyr opined that the follow-up audit revealed that the

1997 audit improved GE's performance. (TR 786).

Mr. Bastyr testified that in 2001, he had a conversation with his supervisor, Kevin Yessian, who said that Mr. Shirani was interested in returning to the nuclear department. (TR 787). The witness stated that he replied that he was willing to have Mr. Shirani return, however, he had a full staff, and Mr. Yessian acknowledged that they could not go over budget by hiring another person. (*Id.*) Mr. Bastyr also said that, hypothetically, if the opportunity arose and budgetary constraints were not an issue, he would need Mr. Shirani's abilities back, but he would not explicitly state that he would want the Complainant to return. (TR 819-820).

Mr. Bastyr noted that during the Complainant's time in the nuclear division, he had given Mr. Shirani and one other employee "signature authority", the power to review and sign documents, usually completed by Mr. Bastyr, in his absence. (TR 788). The witness concluded by stating that he trusted Mr. Shirani to exercise this authority and because the Complainant had proven that he had risen to that level of responsibility. (*Id.*) On cross examination, however, when pressed about the "C" he gave to Mr. Shirani for trust and integrity, Mr. Bastyr stated that he trusted Mr. Shirani to sign certain documents, but the rating dealt with total performance over the course of the year. (TR 795-796).

Applicable Law

Any employer who "intimidates, threatens, restrains, coerces, blacklists, discharges, or in any manner discriminates against any employee because the employee has: (1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in 24.1(a)..." is deemed to have violated federal law and the regulations.[2]

"Under the Energy Reorganization Act of 1974, any complaint shall be filed within 180 days after the occurrence of the alleged violation."[3]

Elements and Burden of Proof

In a case involving an environmental whistleblower, the complainant has the burden of proof to make a *prima facie* showing that: (1) the complainant engaged in a protected activity; (2) the complainant was subjected to adverse action; (3) the respondent was aware of the protected activity when it took the adverse action; and (4) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action.[4]

If a complainant successfully establishes a *prima facie* case, the respondent must produce evidence of a legitimate, nondiscriminatory reason for the adverse action, in order to rebut the complainant's showing.[5] The respondent bears only the burden of production of rebuttal

evidence.[6] The complainant may then counter the respondent's evidence by proving, by a preponderance of the evidence, that the respondent's reasons are not the true reasons for the adverse action, but rather, a pretext for discrimination.[7] Likewise, at all times, the complainant bears the burden of demonstrating, by a preponderance of the evidence, that the adverse action was in retaliation for the protected activity, in violation of the law.[8]

Discussion

Mr. Shirani testified that he made an oral complaint to the Department of Labor on February 1, 2002. (TR 500). He also noted that he signed a written complaint on February 27, 2002. (TR 501). The written complaint was then submitted to the Department of Labor on February 28, 2002, and received on March 5, 2002. (RX 44). After conducting an investigation, OSHA determined that the case should be dismissed, finding that the evidence did not support the Complainant's claims. The Complainant appealed to this Court for adjudication of his claim.

Protected Activity

As noted above, the first element a complainant must prove is that he engaged in protected activity. Mr. Shirani alleged that he engaged in protected activity by his communications with the Nuclear Regulatory Commission, including a complaint on November 1, 2001, and

conversations with the NRC's Ross Landsman, such as a discussion on January 19, 2001. (TR 503). Moreover, the Complainant also noted that Mr. Landsman ultimately received a copy of one of his audit reports. The Respondent has not contested that the Complainant engaged in protected activity. After reviewing all of the facts, I find that the Complainant engaged in protected activity, and established the first element of a *prima facie* case.

Adverse Action

The second requirement for a case of retaliation requires adverse action by the respondent. There are two potential adverse actions to be considered in the instant matter. First, Mr. Shirani was not chosen for the position of Principal Audit Manager. Subsequently, Mr. Shirani's employment with Exelon was terminated. Thus, I will consider the Respondents' failure to hire the Complainant, and his eventual termination, as separate potential adverse actions.

Failure to Hire

When determining whether a complainant has established an actionable adverse action in a failure to hire case, the framework of a *prima facie* case outlined in *McDonnell Douglas Corp. v. Green* applies.[9] In order to establish a *prima facie* showing of discriminatory refusal to hire, the complainant must show that: (1) he applied and was qualified for a job for which the

employer was seeking applicants; (2) despite his qualifications, he was rejected; and (3) after his rejection, the position remained open and his employer continued to seek applicants from persons with the complainant's qualifications.[10]

In the present case, the Complainant applied for the position of Principal Audit Manager, which was in the E-4 pay band under Ms. Caya's restructuring plan for the Internal Audit department. Ms. Garza testified that she encouraged the Complainant to apply for all the positions for which he believed he has was qualified. (TR 642). Ms. Caya likewise testified that, during several conversations with Mr. Shirani, she encouraged him to apply for the position of Senior Auditor because it was unlikely that he would be hired to fill a manager-level position. (TR 543, 551). Moreover, according to Mr. Palacios, the Complainant raised some concerns about his qualifications for positions within the Internal Audit department. (TR 591-592). Finally, Ms. Caya explained that she wanted someone with well-rounded experience in all facets of auditing, plus supervisory experience, to serve as Principal Audit Manager. (TR 546-547). According to her, Mr. Shirani did not meet those criteria; therefore, he was not chosen for the position. (TR 552-556). Thus, while Exelon BSC's Internal Audit department was seeking applications from all employees under the restructuring plan, and the Complainant applied for the job of Principal Audit Manager, the evidence does not establish

that the Complainant was qualified for that position.

Regarding the second prong of the discriminatory refusal to hire test, Ms. Caya noted that some job criteria were not absolute prerequisites, however other competencies were required. (TR 547-548). As noted above, she determined that Mr. Shirani was not qualified. Based on that determination, he was thus rejected for the position he sought.

Finally, according to Ms. Caya's restructuring plan, all of the positions were open and employees were required to submit applications to be considered for a position. Ms. Caya drafted job descriptions and posted them on the internal Human Resources placement system via e-mail, dated October 2, 2001. (TR 541; RX 4). The posting noted that applications were due by October 16, 2001. (RX 4). The e-mail noted that positions left vacant would be assessed before filling them externally. (*Id.*) The posting had a finite time, and two individuals were selected to fill the Principal Audit Manager position. Ms. Caya testified that the individuals chosen met the required competencies, had stronger educational backgrounds and more practical experience than the Complainant, and had recent experience supervising employees. (TR 551-556).

The Respondents have not addressed the issue of adverse action against the Complainant by failing to hire him for the position of Principal

Audit Manager. However, after reviewing the facts, I find that the Respondents did not take adverse action against the Complainant because, although he applied for a position posted by the Respondents, he was not qualified. Moreover, while he was rejected for the position, the Respondents did not continue seeking applicants; rather, the Respondents hired two people with greater qualifications. Thus, the Complainant is not able to establish adverse action by the Respondents' failure to hire him.

Termination of Employment

Mr. Shirani alleged that he was terminated by the Respondents. Such action would constitute an adverse action. The Respondents have not contested that it took adverse action against the Complainant. After reviewing the facts, I find that the Respondents did take adverse action against the Complainant by terminating his employment. The Complainant has thus established the second element of a *prima facie* case.

Respondents' Knowledge of Protected Activity

A complainant must demonstrate that one or more of the respondent's employees, who had input in the hiring decisions, had knowledge of the complainant's protected activity during the relevant time period.[11] Mr. Shirani and Mr. Bastyr discussed the release of the Holtec audit, pursuant to Mr. Landsman's request, during the

time when the Complainant worked in Mr. Bastyr's department. The Complainant ultimately left the nuclear department, and Mr. Bastyr's supervision, when he was hired to join Exelon BSC. Ms. Gillis, who hired Mr. Shirani for a position with Exelon BSC, stated that she knew Mr. Bastyr, and other executives in the nuclear division, such as Mr. Helwig and Mr. Kingsley. (TR 696-697). She further stated, however, that none of them asked or told her to take any particular action regarding Mr. Shirani. (*Id.*) In addition, she said that she was unaware of the Complainant's reputation in the nuclear department. (TR 722).

Initially, Mr. Shirani dealt with Ms. Gillis and supervisors at Arthur Anderson. In April 2001, Ms. Gillis hired Ms. Caya to oversee and organize the Internal Audit department's restructuring. (TR 693). Ms. Caya noted that she was solely responsible for selecting a department manager, and Ms. Gillis did not attempt to influence her decision. (TR 548-549). While Ms. Caya testified that she knew Mr. Shirani had audited GE while in the nuclear department, and that the audit was not favorably received, she stated that she has never spoken to Mr. Bastyr, Mr. Helwig, Mr. Kingsley, or anyone else in Exelon Nuclear. (TR 563-565). Additionally, she said that none of those individuals asked or told her to take any action regarding Mr. Shirani. (*Id.*)

Officials in Exelon Nuclear, such as Mr. Bastyr, knew of the Complainant's protected activity.

However, Mr. Shirani had since moved to Exelon BSC. The Complainant has not proven that anyone from Exelon or Exelon GENCO ever asked, suggested or directed anyone in Exelon BSC to take any action regarding Mr. Shirani's employment. Rather, Ms. Caya noted that she had sole responsibility for restructuring the Internal Audit department, and she never communicated with the Complainant's former supervisors in Exelon Nuclear.

After reviewing the evidence, I find that the Claimant has failed to prove that the Respondents' employees who had input into the hiring decision in October 2001 had knowledge of his protected activity. Thus, the Claimant has failed to establish the third element of a *prima facie* case.

Nexus of Protected Activity and Adverse Action

Finally, a complainant must show that the protected activity was the likely reason for the adverse action. I previously found that the Respondents' termination of the Complainant was an adverse action. However, the Complainant failed to establish the Respondents' knowledge of his protected activity, the third prong of a *prima facie* case. Despite this shortcoming, I will consider the evidence of a nexus between Mr. Shirani's protected activity and the Respondents' adverse action.

The Complainant examined his protected activity in great detail, but discussed only briefly a relationship to the adverse action taken by the Respondents. The Claimant's closing brief suggested that Mr. Shirani was targeted for removal for several years, because of certain activities (*i.e.* his audits), which occurred years before Ms. Caya's arrival. However, the Claimant gave only cursory treatment to Ms. Caya's employment decisions, and instead attacked her credibility for her testimony. In his reply brief, Complainant simply stated that "Caya's action was a pretext for discrimination with roots traced back to 1997 when Shirani wrote the GENE special audit findings and amplified when he wrote the nine findings in the 2000 Holtec/U.S. Toll & Die audit." (Complainant's Reply [Closing] Brief, at 5)(citation omitted).

Rather than address the adverse action of termination, the Complainant charged the Respondents with carrying out a long and detailed conspiracy against him. Specifically, the Complainant argued that Ms. Gillis lured him to Exelon BSC to remove him from the nuclear operations. The Respondents challenged this assertion by claiming the Mr. Shirani sought assistance from Ms. Gillis in securing a position outside of Exelon Nuclear.

I have carefully considered and reviewed the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative

and available evidence, analyzing and assessing its cumulative impact on the record.[12]

Based on the unique advantage of having heard the testimony firsthand, I observed the behavior and demeanor of the witnesses. To the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses. After reviewing the criteria for credibility, and listening to Ms. Gillis' testimony at length, I find Ms. Gillis to be a highly credible witness and her testimony compelling. Moreover, Ms. Gillis' testimony is supported by the evidence in the record.

Ms. Gillis testified that Mr. Shirani expressed his disappointment and dissatisfaction in a lack of recognition in the nuclear division. (TR 669). Ms. Gillis noted that she gave the Complainant job advice (TR 670); ultimately, she stated that Mr. Shirani asked her for a position in Exelon BSC. (TR675). Ms. Gillis was not the only witness to testify that the Complainant expressed frustration with his current position. Mr. Bastyr stated that Mr. Shirani complained about his lack of advancement in the nuclear division and had requested a voluntary separation package. (TR 769-770). The Complainant provided no evidence to support his claims of being lured to Exelon BSC, nor did he refute his alleged frustration with the lack of advancement in Exelon Nuclear. Thus, I find that the

Complainant sought opportunities in the company, including the move to Exelon BSC.

Ms. Gillis also testified that no one from Exelon's nuclear division asked, suggested or directed her to take any action regarding Mr. Shirani's employment with the corporation. (TR 696-697). She also stated that she explained to the Complainant that she was in the process of hiring a General Auditor to rebuild the Internal Audit department (TR 677), which she subsequently did in April 2001, when she hired Ms. Caya. (TR 693). Ms. Gillis said that Ms. Caya was going to have the responsibility to reorganize the department and she did not have any part in the decision to hire or terminate Mr. Shirani. (TR 696).

Ms. Caya told a similar story. According to her, she was hired in April 2001, and during that summer, she developed her restructuring plan, including the method of hiring staff for the redesigned positions. (TR 538-541). In October, she released her plan via e-mail to her subordinates, including Mr. Shirani. (RX 4). Ms. Gillis, Ms. Caya and Ms. Garza each explained that under the type of staffing process used by Ms. Caya, an employee had to apply for each position sought. (TR 696, 544-545, 642-643, respectively).

During this process, the Complainant applied for one position. Ms. Garza and Ms. Caya both stated that they cautioned him to apply for each position for which he thought he was qualified.

Each testified that Mr. Shirani was not interested in applying for a lower position because of the limited earning potential of the E-3 pay band in relation to his current salary. Likewise, Mr. Shirani stated that he did not apply for other positions because he did not feel he was qualified for the higher positions and he avoided the lower job classification because the maximum salary was close to his current salary. (TR 491). He further noted that he applied for the Principal Audit Manager position because it had the same title as the position he held when hired by Ms. Gillis. (TR 490-491).

Ms. Caya stated that she alone made the decision not to hire Mr. Shirani for the manager role because he lacked qualifications that she deemed to be essential. (TR 548, 552-556). Mr. Shirani had not applied for any other position. Pursuant to the selection process guidelines described above, as explained by Ms. Gillis, Ms. Caya and Ms. Garza, the Complainant was not eligible to be considered for any other position, and was terminated. The Complainant suffered the same fate as three other similarly situated employees. Each incumbent had applied for a position or positions and was not selected; thus, each employee was terminated and eligible for the same separation package as the others. (TR 560).

The Complainant claimed that Ms. Caya's decision was part of a conspiracy, however, he offered no evidence to refute her testimony that she made this employment decision on her own.

Moreover, the Complainant acknowledged that he only applied for one position. Since he was not chosen, his employment with Exelon was terminated. None of the evidence of his termination indicates any connection to his protected activity while employed in the nuclear division. Thus, the Complainant has failed to establish a nexus between his protected activity and the Respondents' adverse action. Therefore, he has not established the fourth element of a *prima facie* case.

Respondents' Legitimate, Non-discriminatory Reason

Assuming *arguendo* that the Complainant had established all four elements of a *prima facie* case, the Respondents would be required to produce evidence of a legitimate, nondiscriminatory reason for the adverse action, in order to rebut the Complainant's showing.[13] The Respondents bear only the burden of production of rebuttal evidence.[14]

In their closing brief, the Respondents alleged that the sole reason for Complainant's termination was that he was not selected for the Principal Audit Manager position, the only position for which he applied. (Respondents' Post-hearing Brief, at 21). They further alleged that he had notice that it was unlikely that he would be hired in that capacity, and he should have applied for a position in the E-3 pay band, such as Senior Auditor. (*Id.* at 22). This allegation was based on Ms. Caya's testimony

that she had previously told the Complainant that it was unlikely he would be hired for the manager's position and he needed to apply for other positions. (TR 543).

Ms. Caya was responsible for crafting the department's restructuring plan and writing the job descriptions for the various positions. In filling the position of manager, she stated that she wanted someone with a "full depth and breadth of auditing" experience, including a background in the three types of auditing done by her department. In addition, she was looking for someone with supervisory experience. In her testimony, Ms. Caya noted that Mr. Shirani did not have experience in all of the different types of audits, nor did he have supervisory experience in the financial section.

The two individuals ultimately chosen for the manager positions had years of auditing experience, as well as supervisory experience. Their credentials appear to be consistent with Ms. Caya's requisite competencies, and superior to the Complainant's qualifications. The Complainant only applied for the position of manager and was not chosen. As a result of this selection process, and pursuant to the process guidelines, Mr. Shirani was terminated.

Mr. Shirani was terminated in accordance with the restructuring process rules, and as such, was treated the same as similarly situated employees. After reviewing the evidence, I find that the Respondents have produced evidence of

a legitimate, nondiscriminatory reason for terminating the Complainant's employment.

The Respondents have demonstrated a legitimate, nondiscriminatory reason for their adverse action toward the Complainant, and thus, met their burden. The Complainant must now show, by a preponderance of the evidence, that the Respondents' reasons are not the true reasons for the adverse action, but rather, a pretext for discrimination.[15]

The Complainant offered no evidence to explain why he was better qualified for one of the manager positions, or why he should have been hired over those chosen. Nor has the Complainant offered any evidence to explain why he should not have been terminated after he was not chosen for the only position for which he applied. Finally, the Complainant asserted that Ms. Caya's action was a pretext for discrimination, however he failed to offer any evidence to support this allegation. The Complainant has thus failed to show, by a preponderance of the evidence, that the Respondents' reasons for the adverse action were a pretext for discrimination.

Conclusion

The Complainant engaged in protected activity while employed with the Respondents. The Respondents did not take adverse action against the Complainant when they did not select him as the Principal Audit Manager because he was

not qualified and the Respondents did not continue seeking applications from similarly qualified candidates. Based on the evidence, however, the Respondents took adverse action against the Complainant by terminating his employment. The Complainant failed to establish that the Respondents had knowledge of his protected activity when they took the adverse action. Likewise, the Complainant failed to establish any nexus between his protected activity and the Respondents' adverse action. Finally, the Respondents demonstrated legitimate, nondiscriminatory reasons for the adverse action taken against the Complainant. The Complainant failed to establish that the Respondents' reasons were not the true reasons for the adverse action, but rather a pretext for discrimination.

Recommended Order

Accordingly, in view of the foregoing, and based upon the entire record, I hereby recommend that the claim filed by the Complainant, Oscar B. Shirani, under the Energy Reorganization Act, be dismissed.

A

ROBERT J. LESNICK

Administrative Law Judge

RJL/SR/dmr

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

1. The Final Investigative Report listed the filing date of the complaint as January 28, 2002. However, Mr. Shirani testified that he signed the complaint form on February 27, 2002. (TR 501). Moreover, the Complainant's counsel submitted a cover letter with the complaint. That letter is dated February 28, 2002, and the Certified Mail Receipt was date stamped March 5, 2002. (RX 44). Accordingly, I find that the date of filing was February 28, 2002.

2. 29 C.F.R. 24.2(b).

3. 29 C.F.R. 24.3(b)(2).

4. *Glenn v. Lockheed*, 1998-ERA-35/-50 (ALJ July 15, 1999).

5. *Carroll v. Bechtel Power Corp.*, 1991-ERA-46 (Sec'y Feb. 15, 1995).

6. *Shusterman v. Ebasco Servs., Inc.*, 1987-ERA-27 (Sec'y Jan. 6, 1992).

7. *Frady v. Tennessee Valley Authority*, 1992-ERA-19/-34 (Sec'y Oct. 23, 1995).

8. *Id.*

9. *Webb v. Carolina Power & Light Co.*, 1993-ERA-42 (ALJ July 24, 1996)(aff'd, ARB August 26, 1997).

10. *Id.*

11. *Frady v. Tennessee Valley* Authority, 1992-ERA-19/-34, at 6 (Sec'y Oct. 23, 1995); *Floyd v. Arizona Public Service Co.*, 1990-ERA-39, 5 (Sec'y Sept. 23, 1994).

12. *See, e.g., Frady v. Tennessee Valley Auth.*, 92-ERA-19/-34, at 4 (Sec'y Oct. 23, 1995) (citing *Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *see also Indiana Metal Prod. v. Nat'l Labor Relations Bd.*, 442 F.2d 46, 52 (7th Cir. 1971).

13. *Carroll v. Bechtel Power Corp.*, 1991-ERA-46 (Sec'y Feb. 15, 1995).

14. *Shusterman v. Ebasco Services, Inc.*, 1987-ERA-27 (Sec'y Jan. 6, 1992).

15. *Frady v. Tennessee Valley Authority*, 1992-ERA-19/-34 (Sec'y Oct. 23, 1995).

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 13, 2006

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

No. 05-4455

OSCAR B. SHIRANI, *Petitioner,*	Petition for Review of an Order of the Department of Labor
v.	No. 03-ARB-100

UNITED STATES DEPARTMENT OF LABOR,
Respondent,

and

EXELON CORPORATION,
Intervening Respondent.

ORDER

On August 14, 2006, the petitioner filed a petition for rehearing and for rehearing en banc. All the judges on the original panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petitions for rehearing and rehearing en banc are therefore DENIED.

FILED
MAY 18 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1141

In the Supreme Court of the United States

OSCAR B. SHIRANI, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JONATHAN L. SNARE
Acting Solicitor of Labor

STEVEN J. MANDEL
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether petitioner was required to show that his employer was aware of his protected activity and that his protected activity was a contributing factor in his termination in order to establish à violation of Section 211(b)(3)(C) of the Energy Reorganization Act, 42 U.S.C. 5851(b)(3)(C).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Doyle v. *United States Sec'y of Labor*, 285 F.3d 243 (3d Cir.), cert. denied, 537 U.S. 1066 (2002) 11
Hasan v. *United States Dep't of Labor*, 400 F.3d 1001 (7th Cir.), cert. denied, 546 U.S. 892 (2005) 8
Holly Farms Corp. v. *NLRB*, 517 U.S. 392 (1996) 8
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 7
Porco v. *Trustees of Ind. Univ.*, 453 F.3d 390 (7th Cir. 2006) 7, 13
Stone & Webster Eng'g Corp. v. *Herman*, 115 F.3d 1568 (11th Cir. 1997) 11, 12
Trimmer v. *United States Dep't of Labor*, 174 F.3d 1098 (10th Cir. 1999) 12
Williams v. *Administrative Rev. Bd.*, 376 F.3d 471 (5th Cir. 2004) 12

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:
5 U.S.C. 706(2)(A) 3

Statutes and regulations— Continued: Page

5 U.S.C. 706(2)(E) 3
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 7
Energy Reorganization Act of 1974, 42 U.S.C. 5801 *et seq.*:
42 U.S.C. 5851 6
42 U.S.C. 5851(a) (§ 211(a)) 2
42 U.S.C. 5851(b)(2) 2
42 U.S.C. 5851(b)(3)(C) 2, 8, 9
42 U.S.C. 5851(b)(3)(D) 2, 9
42 U.S.C. 5851(c)(1) 2
29 C.F.R.:
Section 24.4(d)(2) 2
Section 24.6 2
Section 24.7 2
Section 24.8(a) 2

In the Supreme Court of the United States

No. 06-1141

OSCAR B. SHIRANI, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not published in the *Federal Reporter* but is reprinted in 187 Fed. Appx. 631. The decision of the Department of Labor's Administrative Review Board (Pet. App. 9-32) is unreported. The recommended decision of the administrative law judge (Pet. App. 33-91) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2006. A petition for rehearing was denied on November 13, 2006 (Pet. App. 92). The petition for a writ of certiorari was filed on February 12, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 211(a) of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5851(a), prohibits discrimination against employees in the nuclear energy industry who engage in certain protected activities. The Secretary of Labor (Secretary) is responsible for investigating complaints of discrimination. After completing an investigation, the Secretary either issues an order denying the complaint or finds discrimination and provides relief. 42 U.S.C. 5851(b)(2).

The Secretary may find discrimination "only if the complainant has demonstrated that [protected activity] * * * was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. 5851(b)(3)(C). The Secretary may not order relief for discrimination "if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of [protected activity]." 42 U.S.C. 5851(b)(3)(D).

Under the Secretary's regulations, either the complainant or the respondent can contest the results of an investigation by timely requesting a hearing before an administrative law judge (ALJ). 29 C.F.R. 24.4(d)(2). After a hearing, the ALJ issues a recommended decision on whether to find discrimination. 29 C.F.R. 24.6, 24.7. The Department of Labor's Administrative Review Board (Board) reviews the ALJ's decision and issues a final decision on behalf of the Secretary. 29 C.F.R. 24.8(a). The Board's final decision is reviewable in the court of appeals for the circuit in which the violation allegedly occurred. See 42 U.S.C. 5851(c)(1). The court of appeals reviews the Board's decision under standards provided by the Administrative Procedure Act. *Ibid.*

Under those standards, the court may overturn the Board's decision only if it is "unsupported by substantial evidence" or is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A) and (E).

2. Petitioner is a former employee of Commonwealth Edison, an Illinois electric utility. Pet. App. 2, 39. In 1997, petitioner led an audit of a General Electric Nuclear Energy (GENE) facility. *Ibid.* Following that audit, petitioner recommended that Commonwealth Edison issue a stop-work order against GENE, and Commonwealth Edison issued such an order. *Ibid.* In 1998, David Helwig, a GENE manager who had argued with petitioner about the GENE audit, became a vice-president of Commonwealth Edison. *Ibid.* Petitioner asked Helwig for career advice, and he encouraged petitioner to stay in nuclear auditing because that was petitioner's area of expertise. *Id.* at 17, 53. Petitioner came to believe that Helwig was blocking his career in retaliation for the argument during the GENE audit. *Id.* at 2.

In 2000, petitioner conducted an audit involving "dry casks" that were used to store spent nuclear fuel. Pet. App. 2. The dry casks were supplied by Holtec International/U.S. Tool & Die Co. (Holtec). *Ibid.* In November 2000, petitioner attended a conference sponsored by Holtec and asked company officials about Holtec's compliance with his team's audit report. *Id.* at 2-3, 17. An official from the Nuclear Regulatory Commission (NRC) who attended the conference asked petitioner for a copy of the audit report. *Id.* at 3. In January 2001, after receiving the report, the NRC official asked petitioner why he had not issued a stop-work order. *Id.* at 3, 17. Petitioner stated that he was afraid of losing his job. *Id.* at 3.

In 2000, Commonwealth Edison's parent company merged with PECO Energy Corporation (PECO) to form respondent Exelon Corporation (Exelon). Pet. App. 3. Exelon required PECO and Commonwealth Edison employees to reapply for their positions. *Ibid.* Petitioner reapplied for his nuclear audit position and was selected for it, but he was turned down for management positions. *Ibid.* Discouraged by his inability to obtain a management position in Commonwealth Edison's nuclear section, petitioner sought a different audit position in Exelon's business services area. *Ibid.* The chief financial officer, Ruth Ann Gillis, knew that petitioner was unhappy in the nuclear division but was not aware of conflicts that had arisen in connection with the GENE and Holtec audits. *Id.* at 5-6. She selected petitioner for an internal audit position in the business services area and raised his salary from $86,887 to $94,000. *Id.* at 3, 19. Petitioner accepted the job with the understanding that it was an opportunity to learn new skills and that the internal audit area was undergoing organizational changes as a result of the merger. *Id.* at 3.

In April 2001, Gillis hired a general auditor, Ellen Caya, to develop the organizational structure in the business services area. Pet. App. 20, 62. Caya recommended a structure that generally retained existing salary levels. *Id.* at 22. To comply with company rules, however, she had to downgrade each salary level below her own. *Ibid.*; see *id.* at 3-4. Existing employees in the business services area then had to reapply for positions in the new structure and be selected to retain their employment. *Id.* at 3.

Petitioner chose not to apply for his current position because of its lower salary level. Pet. App. 3-4. Despite being warned that he might not be qualified, petitioner

instead applied for a management position. *Id.* at 4. In October 2001, Caya filled both managerial openings by selecting two individuals who, unlike petitioner, had strong financial audit and managerial backgrounds. *Id.* at 25. Caya testified that she knew nothing about petitioner's previous problems and that no one suggested to her that she should or should not select him. *Id.* at 6. Because he was not selected for the management position and had not reapplied for his auditor position, petitioner's employment was automatically terminated. *Id.* at 4. Petitioner then filed a complaint with the Department of Labor, alleging that Exelon fired him in retaliation for his 1997 GENE audit and the 2000 Holtec audit that he discussed with the NRC official. *Ibid.*

3. The ALJ recommended dismissing the complaint. Pet. App. 33-91. The ALJ concluded that a whistleblower complainant has the burden of proving a "*prima facie*" case of discrimination that includes proof that (1) he engaged in protected activity, (2) he was subjected to adverse action, (3) the employer was aware of the protected activity when it took adverse action, and (4) the evidence raises a reasonable inference that protected activity was the likely reason for the adverse action. *Id.* at 74. If the complainant meets that burden, the ALJ stated, the employer only has the burden of producing a legitimate nondiscriminatory reason for its actions. *Ibid.* If the employer meets that burden, the ALJ concluded, the complainant can prevail by proving by the preponderance of the evidence that the employer's reasons are not its true reasons but a pretext for discrimination. *Id.* at 74-75.

Applying those standards, the ALJ concluded that petitioner failed to establish two elements of a "*prima facie*" case. First, the ALJ found that petitioner failed

to prove that one or more of Exelon's employees who had input into the October 2001 hiring decision knew of his protected activity. Pet. App. 79-81. Second, the ALJ found no causal nexus between protected activity and the October 2001 hiring decision that led to petitioner's termination. *Id.* at 81-86. The ALJ further found that Exelon produced a legitimate, nondiscriminatory reason for terminating petitioner and that petitioner failed to prove that this reason was a pretext for discrimination. *Id.* at 86-88.

4. The Board agreed with the ALJ's recommendation and dismissed the complaint. Pet. App. 9-32. The Board stated that an employee establishes a violation of 42 U.S.C. 5851 by proving by a preponderance of the evidence that (1) he engaged in protected activity, (2) his employer subjected him to an adverse employment action, (3) the employer was aware of the protected activity, and (4) the protected activity was a contributing factor in the employer's decision to take adverse action. Pet. App. 26. The Board stated that because the case had been fully tried the ALJ should not have discussed those elements in terms of a complainant's "prima facie" case. *Id.* at 31. The Board also corrected the ALJ for stating that a complainant must show that protected activity was "the *likely* reason" for an adverse action, rather than "a contributing factor" in the action. *Id.* at 31-32 & n.3 (citation omitted).

Applying those proof requirements, the Board found that petitioner failed to establish employer knowledge of protected activity or a causal connection between his job loss and protected activities. Pet. App. 28-29. The Board found that "the overwhelming weight of the evidence" supports the ALJ's findings that the persons who had input into the decision not to hire petitioner in Octo-

ber 2001 were not aware of his safety activities and that there was no other evidence of a causal nexus between those activities and his nonselection. *Id.* at 28.

5. The court of appeals affirmed. Pet. App. 1-8. The court concluded that the Board's decision was not arbitrary, capricious, or an abuse of discretion. *Id.* at 5-6. The court stated that petitioner was required to establish that the officials involved in the decision not to hire him knew of his protected activity and that circumstances were sufficient to raise an inference that protected activity contributed to his termination. *Id.* at 5. The court found substantial evidence to support the Board's finding that petitioner's termination was not based on his protected activity. *Id.* at 6.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 4-5) that the court of appeals erred in holding that the framework established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), for cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, also applies to cases arising under the Energy Reorganization Act (ERA). That argument is not properly presented because petitioner did not raise it in the court of appeals until his reply brief and thereby waived it. *Porco* v. *Trustees of Ind. Univ.*, 453 F.3d 390, 395 (7th Cir. 2006). The court of appeals also did not purport to apply the *McDonnell Douglas* Title VII framework in this case. Instead, without any discussion of *McDonnell Douglas* or Title VII, the court held that petitioner was required

to prove that the officials involved in the decision not to hire him "knew of [petitioner's] protected activity" and "that the circumstances were sufficient to raise an inference that protected activity contributed to his termination." Pet. App. 5. Because the court below did not decide whether the *McDonnell Douglas* Title VII framework should apply to the ERA, that question is not properly presented here. *Holly Farms Corp.* v. *NLRB.*, 517 U.S. 392, 400 n.7 (1996).

Petitioner asserts (Pet. 5) that the court of appeals necessarily applied the *McDonnell Douglas* Title VII framework because it followed its earlier decision in *Hasan* v. *United States Department of Labor*, 400 F.3d 1001, 1004 (7th Cir.), cert. denied, 546 U.S. 892 (2005). In that case, the parties agreed that the Title VII standard for establishing a prima facie case of retaliation applies to retaliation cases under the ERA, and the court went on to analyze the case under that standard. But the court of appeals in this case did not even cite *Hasan*, much less purport to apply its analysis. Thus, assuming that the *Hasan* court adopted the *McDonnell Douglas* framework, rather than simply using it based on the parties' agreement, there is no basis for petitioner's claim that the court in this case applied the *McDonnell Douglas* Title VII framework.

2. To the extent that petitioner challenges the standards actually applied by the court of appeals in this case as inconsistent with the ERA, that challenge is without merit. The ERA requires a complainant to demonstrate that protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. 5851(b)(3)(C). If the complainant makes such a showing, the burden shifts to the employer to "demonstrate[ ] by clear and convincing evidence that

it would have taken the same unfavorable personnel action in the absence of [protected activity]." 42 U.S.C. 5851(b)(3)(D). The court of appeals' holding that petitioner was required to show that the officials involved in the decision not to hire him "knew of [petitioner's] protected activity," and that "the circumstances were sufficient to raise an inference that protected activity contributed to his termination" (Pet. App. 5), is fully consistent with the ERA's statutory standards.

The court's requirement that petitioner show that "the circumstances were sufficient to give rise to an inference that protected activity contributed to his termination" (Pet. App. 5) is simply a restatement of the ERA's requirement that a complainant show that protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. 5851(b)(3)(C). And the court's requirement that petitioner show that officials involved in the decision knew of petitioner's protected activity directly implements that statutory requirement. Unless a complainant can show that persons involved in the decision were at least aware of the protected activity, the complainant cannot begin to show that the protected activity was a contributing factor in the decision. Indeed, petitioner does not appear to contend that the court of appeals erred in holding that petitioner was required to make those two showings.

Instead, petitioner contends (Pet. 4) that the court of appeals deviated from the proper "contributing factor" standard when it stated that there was substantial evidence to support the Board's determination that petitioner's termination was not "based" on his protected activity. Petitioner's criticism is misguided. The court of appeals first announced that petitioner was required

to show that the persons involved in the hiring decision were aware of his protected activity and that his protected activity contributed to that decision. Pet. App. 5. It then cited Gillis' testimony that she was unaware of petitioner's conflicts over the GENE and Holtec audits, and Caya's testimony that she knew nothing about petitioner's previous problems and that no one had suggested to her that she should not hire petitioner. *Id.* at 5-6. The court then concluded that this testimony supplied substantial evidence to support the Board's determination that petitioner's termination was not based on his protected activity. *Id.* at 6. In context, the court's statement that substantial evidence supported the Board's determination that petitioner's termination was not "based on" protected activity was simply another way of saying that petitioner failed to meet the ERA statutory requirement of showing that his protected activity was a "contributing factor" in his termination.

Petitioner also contends (Pet. 4-5) that the court of appeals failed to apply the proper standard because it did not discuss whether the employer had proven through clear and convincing evidence that it would have taken the same action in the absence of petitioner's protected activity. But an employer's burden to make that showing arises only when the complainant has first shown that protected activity was a contributing factor in the adverse decision. Because the court of appeals affirmed the Board's finding that petitioner failed to satisfy his initial burden of showing that his protected activity was a contributing factor in the challenged decision, the court had no occasion to address whether the employer would have made the same decision even absent the protected activity.

3. Petitioner contends (Pet. 5-10), that the decision below conflicts with the decisions of other courts of appeals. There is, however, no conflict.

In *Doyle* v. *United States Secretary of Labor*, 285 F.3d 243, 249-251, cert. denied, 537 U.S. 1066 (2002), the Third Circuit stated that the 1992 amendments to the ERA "incorporate a burden-shifting paradigm whereby the burden of persuasion falls first upon the complainant to demonstrate that retaliation for his protected activity was a 'contributing factor' in the unfavorable personnel decision." *Id.* at 249. Because the amendments did not apply to the case before it, the court did not address the standards to be applied in deciding whether an employee met that burden of persuasion under the amendments. *Id.* at 249-250. *Doyle* therefore had no occasion to address the question presented here.

In *Stone & Webster Engineering Corp.* v. *Herman*, 115 F.3d 1568, 1572 (1997), the Eleventh Circuit held that the ERA requires an employee to persuade the Secretary that protected activity was a contributing factor in an adverse action and then, if the employee succeeds, allows an employer to prove by clear and convincing evidence that it would have taken the same action in the absence of protected activity. The court affirmed the Secretary's findings that the employee in that case met his burden of showing he had suffered retaliation for engaging in protected activity while the employer did not meet its burden of showing it would have taken the same action in any event. *Id.* at 1573-1576. In discussing the employee's burden of proof, the Eleventh Circuit, like the court of appeals in this case, considered whether the employer was aware of the employee's protected activity and whether there was evidence that the employee's protected activity was a contributing factor

in the adverse action taken against the employee. *Id.* at 1573. *Stone & Webster* is therefore fully consistent with the Seventh Circuit's decision in this case.

In *Trimmer* v. *United States Department of Labor*, 174 F.3d 1098 (1999), the Tenth Circuit held that "[o]nly if the complainant meets his burden [of proving by a preponderance of the evidence that he engaged in protected activity that was a contributing factor in an unfavorable employment decision] does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." *Id.* at 1102. Applying that analysis, the court affirmed the Secretary's finding that the complainant failed to prove one of the elements of his case—an adverse employment action. *Id.* at 1103-1104. There is no inconsistency between that analysis and the court of appeals' decision in this case.

In *Williams* v. *Administrative Review Board*, 376 F.3d 471, 476 (2004), the Fifth Circuit concluded that the ERA requires an employee to prove that he engaged in protected conduct, that the employer was aware of that conduct, and that the employer took adverse action because of that conduct. While the court used slightly different terminology, that analysis corresponds to the analysis undertaken by the court of appeals in this case.

Thus, none of the decisions relied on by petitioner is in conflict with the decision below. Instead, they are consistent with that decision.

3. Petitioner's remaining contentions do not warrant review. Petitioner contends (Pet. 17) that the court of appeals improperly "ignored" his employer's alleged refusal to allow him to return to the nuclear section from the financial area. The court, however, did not ignore

petitioner's allegation. Instead, the court concluded that because petitioner did not point to anything in the record that indicated that petitioner applied and was turned down for a job that would have transferred him back to the nuclear section, his allegation was "too amorphous" to serve as concrete evidence of retaliation based on his status as a whistleblower. Pet. App. 7-8. The court's fact-bound conclusion does not warrant review.

Petitioner also contends (Pet. 17) that Caya knew that he had engaged in protected activity because she knew about the GENE audit and its unfavorable reception. That contention, however, incorrectly equates Caya's knowledge of the audit and its unfavorable reception with knowledge that the audit involved protected activity. See Pet. App. 29. In any event, that fact-bound contention does not warrant review.

Finally, petitioner asserts (Pet. 18) that he never applied for the managerial position for which he was not selected. But petitioner waived that contention by failing to raise it in the court of appeals until he filed his reply brief. See, *e.g.*, *Porco*, 453 F.3d at 395. The argument is also meritless because petitioner and other witnesses said he did apply for the position. See Pet. App. 23-25, 46, 65-66.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JONATHAN L. SNARE
Acting Solicitor of Labor

STEVEN J. MANDEL
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

EDWARD D. SIEGER
Attorney
Department of Labor

MAY 2007

FILED
JUN 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1141

In the Supreme Court of the United States

OSCAR B. SHIRANI,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent,

and

EXELON CORPORATION,

Intervening Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DOLORES C. PINO
Counsel of Record
7200 Wilson Terrace
Morton Grove, IL 60053-1142
(847) 965-3354

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii - vi
I. The Circuit Conflict On The Important Issue Of The Applicable Evidentiary Standards For ERA Claims Is Significant And Is Squarely Presented.	1 - 8
II. Respondent's Attempt to Re-frame This Appeal Into One Of Fact Ignores That Key Conclusions Of Fact Were Determined Under Incorrect Legal Standards.	8 - 10
Conclusion	10

TABLE OF AUTHORITIES

Cases **Page**

Aka v. Washington Hospital Ctr., 156 F.3d 1284 (D.C. Cir. 1988) (en banc) 9

Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) 7

DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000) 4

Doyle v. *U.S. Sec. Labor*, 285 F.3d 243 (3rd Cir. 2002) 6

Dunham v. Brock, 794 F.2d 1037 (5th Cir. 1986) ... 10

English v. Gen. Elec. Co., 496 U.S. 72 (1990) 7

Frobose v. American Sav. & Loan, 152 F.3d 602 (7th Cir. 1998) 6

Goshtasby v. Bd. of Trustees, 141 F.3d 761 (7th Cir. 1998) 3, 8

Grogan v. Garner, 498 U.S. 279 (1991) 5

Haley v. Reisinas, 138 F.3d 1245 (8th Cir. 1998) ... 4

Hartman v. Moore, 547 U.S. 250, 164 L. Ed. 2d 441 (2006) 5

Hasan v. *U.S. Dep't of Labor*, 400 F.3d 1001 (7th Cir. 2005) 1, 2, 3, 8

In re Bentz Metal Prods. Co., Inc., 231 F.3d 1029 (7th Cir. 2000) 3

Ineichen v. Ameritech, 410 F.3d 956 (7th Cir. 2005) 4

Int'l Truck & Engine Corp. v. Bray, 372 F.3d 717 (5th Cir. 2004) 1, 2

Kahn v. U.S. Sec. of Labor, 64 F. 3d 271 (7th Cir. 1995) 5

Mandreger v. Detroit Edison Co., 88-ERA-17, D & O of SOL (Mar. 30, 1994) 9

Marano v. DOJ, 2 F.3d 1137 (Fed. Cir. 1993) 4

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) ..... *passim*

Old Ben Coal Co. v. Director, OWCP, 62 F.3d 1003 (7th Cir. 1995) 10

Pillow v. Bechtel Constr. Inc., 87-ERA-35, D & O of Remand by SOL (July 19, 1993) 9

Porco v. Trustees of Ind. Univ., 453 F.3d 390 (7th Cir. 2006) 1

Posters 'N' Things, Ltd. v. United States, 511 U.S. 513 (1994) 7

Pozzie v. U.S. Dep't of Hous. and Urban Dev., 48 F.3d 1026 (7th Cir. 1995) 10

Radue v. Kimberly-Clark Corp., 219 F.3d 612 (7th Cir. 2000) 4

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) 9

Rouse v. Farmers State Bank of Jewell, 866 F. Supp. 1191 (N.D. Iowa 1994) 4, 5

Russ v. Watts, 414 F.3d 783 (7th Cir. 2005) 3

Samoduro v. General Physics Corp., 89 ERA-20, D & O of SOL (Nov. 16, 1993) 2

Stone & Webster Engineering Corp. v. *Herman*, 115 F.3d 1568 (11th Cir. 1997) 6

Tate v. Showboat Marina Casino P'ship, 431 F.3d 580 (7th Cir. 2005) 2

Texas Dep't Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 5

Timmons v. Mattingly Testing Serv., 95-ERA-40, (June 21, 1996), D & O of Remand by ARB 5

Trimmer v. *U.S. Dep't of Labor*, 174 F.3d 1098 (10th Cir. 1999) 6

Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994) 4

United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983) 9

Wheeler v. Caterpillar Tractor Co., 108 Ill.2d 502, 511, 485 N.E.2d 372, 377 (Ill. 1985) 7

Williams v. Administrative Review Bd., 376 F.3d 471 (5th Cir. 2004) 6

Statutes and regulations

Administrative Procedure Act, 5 U.S.C. § 706(2)(A) 9

Aviation Whistleblower Protection Provision, 49 U.S.C. § 42121 3

Civil Rights Act of 1964, Title VII, § 701 *et seq.*, 42 U.S.C. § 2000e *et seq.* 4-5

Energy Reorganization Act ("ERA"), 42 U.S.C.A. § 5851 ..... *passim*

1992 Amendments to the Energy Reorganization Act, Pub.L. 102-486, § 2902(d), adding par. (3), made effective by § 2902(i) to claims filed on or after October 24, 1992 ..... *passim*

FDIC Whistleblower Law, 12 U.S.C. § 1831j(f) ... 3-4

Whistleblower Protection Act of 1989, 5 U.S.C. § 1221(e) 3

10 C.F.R. § 50.34(a)(7) Appx. B 10

Other Legal Authority

STEPHEN M. KOHN, CONCEPTS AND PROCEDURES IN WHISTLEBLOWER LAW, Quorum Books (2001) ... 4

FED. R. APP. P. 28(a)(9)(B) 1

NRC Policy Statement, "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation; Policy Statement", 61 Fed. Reg. 24,336 (May 14, 1996) 7

JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE (3d ed. 2006) 1, 2, 3, 8

135 CONG. REC. 5033 (1989) (Whistleblower Protection Act Explanatory Statement) 4

H. REP. NO. 102-474(VIII) (1992), *reprinted in* 1992 U.S.C.C.A.N. 2297 7

S. REP. NO. 848, 95th Cong., 2d Sess. 29 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7303 7

Appendix

Respondent's Exhibit 35, first page 1a

Samples of Petitioner's signature from record ..... 2a - 4a

BEST AVAILABLE COPY

I. The Circuit Conflict On The Important Issue Of The Applicable Evidentiary Standards For ERA Claims Is Significant And Is Squarely Presented.

1. Contrary to Respondent's argument that the issue of the ERA standards of proof is not presented by the decision below (Opp. 7-8), the Seventh Circuit did reach and explicitly decide this issue, holding that the Title VII/ *McDonnell Douglas* burdens apply. This is shown by the standards of proof recited, the phrasing used in applying the burdens of proof, that the decision below was affirming the ARB decision which applied the Title VII standards, and the *stare decisis* effect of the governing circuit precedent of the published 2005 *Hasan*[1] decision.[2]

The decision below recited the applicable standards of proof in two paragraphs. (Pet. App. 4-5). The standards of proof under which the court reviewed this claim are part of the reasoning necessary to the result of its decision, without which the basis of the decision would be impaired, and are therefore part of the "holding".[3] But while the decision

---

[1] *Hasan v. U.S. Dep't of Labor*, 400 F.3d 1001 (7th Cir. 2005).

[2] This issue is not waived (Opp. 7) because Petitioner raised it in the court below in the opening brief by presenting the analysis within the framework of the amended ERA burdens of proof, FED. R. APP. P. 28(a)(9)(B) (the applicable standard of review may appear in the discussion of the issue), Respondent DOL did not argue waiver of the proper ERA burdens of proof in its response brief, and the decision below addressed the ERA burdens of proof, and did not put forth a holding or discuss waiver of burdens of proof. *Porco* does not support Respondent's waiver claim as that case held petitioner's mootness argument waived because it was first raised in the reply brief. *Id.*

[3] *See, e.g.*, 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 134.03[2] (3d ed. 2006), at 134-30 (reasoning necessary to holding is part of holding) and ¶ 134.03[2] at 134-31, 32 (one way to distinguish dictum from reasoning necessary to holding is to determine whether statement in question could be deleted without impairing basis of decision); *see also, e.g., Int'l Truck & Engine Corp. v. Bray*, 372

below does recite the amended "contributing factor," it recited no standard for the employer's ERA burden of proof (Pet. App. 4-5). The court then applied the burdens of proof it recited, using the phrase "based on" twice for the employee's evidence (Pet. App. 6, "Shirani's termination was not *based on* his protected activity" and Pet. App. 8 "an act that discriminated against him *based on* his status as a whistleblower") (emphasis added), instead of the ERA "a contributing factor." The court also applied only the *McDonnell Douglas* burden of production to the employer's evidence (Pet. App. 5 "Shirani was required to establish that the officials who decided not to hire him as a manager during the internal audit reselection process knew of the protected activity", and Pet. App. 26, ARB decision, reciting *McDonnell Douglas* failure to hire test as applicable legal standard), entirely omitting the ERA "clear and convincing" employer's burden of persuasion.[4]

Respondent's argument (Opp. 8) that the decision below was not following the *Hasan* circuit precedent is incorrect. The Court of Appeals in the decision below was following its *Hasan* precedent, as the factors required for the doctrine of *stare decisis* to apply were all met.[5] [6] While

---

F.3d 717, 721 (5th Cir. 2004) (statement is dictum if can be deleted without seriously impairing analytical foundations of holding, and is not dictum if necessary to result or constitutes explication of the governing rules of law), and *Tate v. Showboat Marina Casino P'ship*, 431 F.3d 580, 582 (7th Cir. 2005) ("holding" of a case, for purposes of *stare decisis*, includes not only facts and outcome of case, but also reasoning essential to its outcome).

[4] This was the evidentiary framework used by the DOL prior to the 1992 ERA amendments, *see, e.g., Samoduro v. General Physics Corp.*, 89 ERA-20, D & O of SOL, at 9-10 (Nov. 16, 1993) (DOL applying *McDonnell Douglas* "refusal to hire" Title VII analysis).

[5] *See* 18 MOORE'S FED. PRAC. ¶ 134.02[1][c], at 134-16 ("[t]he published decision of a panel of a court of appeals is a decision of the court and carries the weight of *stare decisis*").

the Seventh Circuit allows one panel to overturn the circuit's precedent for "compelling reasons",[7] [8] the decision below nowhere overruled the *Hasan* decision. *Hasan* does *hold* that the Title VII standards apply to ERA claims because for two full paragraphs after the first sentence beginning "[t]he parties agree", the court explained how it reached that conclusion and how the Title VII framework applied to the ERA claim at bar. *Id.*, 400 F.3d at 1004; note 3, *supra*. Also proving this holding is the court's combining the ERA case with two Title VII retaliation cases into one published opinion to review and harmonize one legal standard for retaliation. *Hasan*, 400 F.3d at 1003.

2. Respondent's claims that the phrase "based on" used in the decision below is the equivalent level of causation as the ERA's "a contributing factor" (Opp. 9, 10) are unsupportable. Beginning in 1989, Congress lowered the Title VII employee burden of persuasion on causation in four federal whistleblower statutes to "a contributing factor".[9] Congress defined "a contributing factor": "[t]he

---

[6] *Id.*, ¶ 134.04[2] at 134-37 (for *stare decisis* to be applied, an issue of law must have been heard and decided), and *Id.*, ¶ 134.05[5] at 134-44.1 (factors for *stare decisis* to apply are: there must be a holding, the decision must involve an issue of law, the decision must be by a majority of the court rendering the decision, and the decision must be from the same court that is seeking to apply the *stare decisis* doctrine).

[7] *Russ v. Watts*, 414 F.3d 783, 788 (7th Cir. 2005).

[8] *In re Bentz Metal Prods. Co., Inc.*, 231 F.3d 1029 (7th Cir. 2000) (vacated on other grounds, No. 00-1320, slip op. (7th Cir. June 7, 2001)); *Goshtasby v. Bd. of Trustees*, 141 F.3d 761, 766 (7th Cir. 1998) (the Seventh Circuit follows the doctrine that a federal court must give considerable weight to its prior decisions, unless overruled or undermined by decisions of a higher court, or other supervening developments, such as statutory overruling).

[9] These are: the ERA (nuclear whistleblower cases), 42 U.S.C. § 5851(b)(3)(A), (C) and (D), the Whistleblower Protection Act of 1989 (WPA) (governing most federal employee cases), 5 U.S.C. § 1221(e), the Aviation Whistleblower Protection Provision, 49 U.S.C. § 42121,

words 'a contributing factor' . . . [mean] any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[10] Further, there is ample evidence from the Title VII caselaw and statutory language that "based on" is one phrasing of the Title VII causation level.[11] The Title VII "based on" is the "but-for"

---

and the FDIC whistleblower law, (governing most banking related whistleblower cases), 12 U.S.C. § 1831j(f). *See* STEPHEN M. KOHN, CONCEPTS AND PROCEDURES IN WHISTLEBLOWER LAW, Quorum Books (2001) at 274-76.

[10] *Marano v. DOJ*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (discussing legislative history of WPA and applying "contributing factor" test, "[t]his test is specifically intended to over-rule existing law which requires a whistleblower to prove that his protected conduct was a "significant", motivating", "substantial", or predominant", factor in a personnel action in order to overturn that action") *quoting* 135 CONG. REC. 5033 (1989) (WPA Explanatory Statement). *See also, Rouse v. Farmers State Bank of Jewell*, 866 F. Supp. 1191, 1207-08 (N.D. Iowa (1994) (comparing Title VII with new statutory framework); *Haley v. Retsinas*, 138 F.3d 1245, 1249 (8th Cir. 1998) (holding "a contributing factor" in FDIC whistleblower case could be met if employer committed adverse action for both legitimate and illegitimate reasons).

[11] *See, e.g.*, line of 7th Circuit Title VII retaliation cases citing *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616 (7th Cir. 2000) (emphasis added) (one way to prove Title VII retaliation is by direct evidence of discrimination, which "essentially requires admission by decision-maker that his actions were *based on* the prohibited animus"); *Ineichen v. Ameritech*, 410 F.3d 956, 962 (7th Cir. 2005) (emphasis added) (in Title VII race and sex discrimination claims, plaintiff "failed to present sufficient direct evidence to avoid summary judgment on her claim that employer discriminated against her *based on* her interracial relationship"); *see also, e.g., DeWalt v. Carter*, 224 F.3d 607 n.7 (7th Cir. 2000) (emphasis added) (in section 1983 claim for discrimination, court used phrase to describe causal link element, "*based on* membership in a definable class, namely, based on his race"); *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994) (emphasis added) (in Pregnancy Discrimination Act case, court used phrase describing causal element, "characteristics *on which* it is forbidden *to base*"). See also, e.g., language of Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C. § 2000e *et seq.*, 2000e-2(a)(1), section 703 (emphasis

causation level,[12] which is, by definition, a distinctly higher level of proof for the employee to meet than the "contributing factor" level of "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[13] Also, the decision below used phrasing for the employer's evidence which affirms a burden of production only,[14] instead of applying the ERA phrase, "clear and convincing".[15] See decision below, Pet. App. 4, "Shirani applied for a management position for which he was previously warned he might not be qualified" and Pet. App. 6, "[t]he head of internal audit who did not select Shirani for the management job for which he applied", affirming this central conclusion of disputed fact[16] which was reached by the ARB under the Title VII

---

added), banning "failure or refusal to hire or discharge or discriminate . . . *because of* person's race, etc.", and 2000e-3(b) making it unlawful for employer to advertise indicating a preference "*based on*" race, etc.

[12] *E.g.*, *Hartman v. Moore*, 547 U.S. 250, 164 L. Ed. 2d 441, 453-54 (2006) (determining causation in retaliatory-prosecution action, the *Mt. Healthy* level of causation is the "but-for" cause without which the adverse action would not have been taken).

[13] *See, e.g., Rouse,* 866 F. Supp. at 1207-08.

[14] *Texas Dep't Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981) (employer's burden is not one of persuasion but only of production of explaining nondiscriminatory reasons for its action); *Kahn v. U.S. Sec. of Labor*, 64 F. 3d 271, 278 (7th Cir. 1995) (in ERA case "the employer need not persuade the court; the burden is simply one of production").

[15] The Secretary of Labor has previously applied this standard to ERA cases in accord with the 1992 ERA amendments, but did not explain its departure from that standard in this case. *See, e.g., Timmons v. Mattingly Testing Serv.*, 95-ERA-40, (June 21, 1996), D & O of Remand by ARB at 16, applying this Court's *Grogan* analysis for the "clear and convincing" evidence standard, *Grogan v. Garner*, 498 U.S. 279 (1991) (discussing "clear and convincing" evidence standard).

[16] During the financial services reorganization in the fall of 2001 (Opp. 4), the employer eliminated the senior/principal financial auditor position Petitioner had held since he was hired there and replaced it

burden of production, not "by clear and convincing" evidence. (Pet. App. 26, 74-75 "respondent bears only the burden of production of rebuttal evidence"). See Pet. App. 25, "[h]e did apply for the E-4 principle/ manager position. Tr. 490-491; RX 35." Also, when the Seventh Circuit applies the "contributing factor" causation level it uses the phrase "a contributing factor", not "based on", and when it applies the "clear and convincing" burden of persuasion to the employer's evidence, it uses the phrase "clear and convincing" or, for example, whether the employer's evidence is "so compelling as to remove all doubt" as to its actions in the absence of the protected activity.[17]

3. Respondent's claim that the circuit conflict is reconcilable (Opp. 11-12) is without merit. The other four circuits reached the issue of law of the applicable ERA burdens of proof, very different burdens from those applied in the *Hasan* decision, in the context of determining the governing evidentiary standards for the case before them. (Pet. 5-10). Their statements on the ERA burdens of proof are therefore part of their authoritative "holdings."[18]

---

with positions with requirements he could never meet. (Pet. C.A. Br. 26). Another employer's Manager sought him out before the application deadlines, and assured him he would be safe applying for his own job again, even though he could not meet the new requirements, (Pet. C.A. Br. 26, Tr. 601-02), which is the job he interviewed for in October 2001. (Pet. C.A. Reply Br. 22, Tr. 490-91). His own senior/principal financial auditor position had never been a Management-level position. (Pet. C.A. Reply Br. 19-20, Tr. 490-91).

[17] *See, e.g., Frobose v. American Sav. & Loan*, 152 F.3d 602, 612-13, 617 (7th Cir. 1998) (in reversing summary judgment for defendant in FDIC whistleblower retaliatory discharge claim, court applied amended burdens of proof using phrase "contributing factor" and distinguishing it from a "substantial or motivating factor", and using phrase "clear and convincing" or "so compelling as to remove all doubt").

[18] See note 3, *supra*.

4. The ERA employee protection is designed by Congress[19] [20] and the NRC to be integral in the system of assuring the safety of this Nation's nuclear power plants. See NRC policy that the nuclear industry and employees have first line responsibility for safety, and so "the perception by fellow workers that raising concerns has resulted in retaliation can generate a chilling effect that may discourage other workers from raising concerns . . . [which] is detrimental to nuclear safety."[21]

5. Even if the circuit conflict is presented less than perfectly by the decision below, it should be resolved with this case because of the ERA's central role in nuclear safety.[22] Neither in the 2005 *Hasan* decision nor in the instant case did the Seventh Circuit acknowledge that Congress had added the high burden of persuasion of "clear and convincing" to the employer's ERA case, and applied the "but-for", Title VII level of causation to the employees'

---

[19] H. REP. NO. 102-474(VIII), at 79 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2297 (*see* Pet. 22).

[20] S. REP. NO. 848, 95th Cong., 2d Sess. 29 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7303, 7304. *See also*, *English v. Gen. Elec. Co.*, 496 U.S. 72, 82-83 (1990); *Wheeler v. Caterpillar Tractor Co.*, 108 Ill.2d 502, 511 (Ill. 1985) (protection of citizens from the hazards of radioactive material is as important and fundamental a public policy as protecting them from crimes of violence).

[21] "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation; Policy Statement", 61 Fed. Reg. 24,336 (May 14, 1996), "Background", available at http://www.nrc.gov/about-nrc/regulatory/allegations/scwe-frn-5-14-96.pdf.

[22] *E.g.*, *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 300 (1986) (granting review, the Court referred to "the importance of the case, and the divergent approaches of other courts to the issue"); *English v. General Electric Co.*, 496 U.S. 72, 78 (1990) ("because of an apparent conflict with a decision of the First Circuit"), and *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 516 (1994) (certiorari granted "[b]ecause of an apparent conflict among the Courts of Appeals").

evidence in both cases. Because the circumstances were present here to overturn the *Hasan* precedent – statutory overruling by the 1992 ERA amendments[23], and the court did not do so, it is likely that the court will continue to apply the Title VII burdens of proof in reviewing ERA cases, undermining employee protection from retaliation and thus undermining nuclear safety. (And this problem will recur nationally due to the DOL manual. Pet. 20-21.)

II. Respondent's Attempt to Re-frame This Appeal Into One Of Fact Ignores That Key Conclusions Of Fact Were Determined Under Incorrect Legal Standards.

Respondent's attempts to defeat review by re-framing Petitioner's error of law appeal as one of error of fact (Opp. 12-13) ignores that dispositive conclusions of fact were determined by the ARB and affirmed in the decision below under the wrong burdens of persuasion. (Opp. 12-13). 1) there were numerous statements in the record of employer anger at Shirani's audit activity (all raised in the opening brief before the court below), especially that the Exelon Licensing Manager was very, very upset about Shirani's attending the Holtec marketing meeting in December 2000 where the NRC learned about his dry cask audit, only one week before Exelon Officer Gillis offered him the job outside of nuclear, (Pet. C.A. Br. 11, 24, Tr. 387-90, 685), and said to him words to the effect of "who the hell invited you to go there?", (Pet. C.A. Br. 8, Tr. 402), all to which the ARB and court below applied the Title VII "but-for" burden of persuasion (see I.1. and 2. above). 2) that the job application for the manager position contains a signature which is an obvious forgery that looks nothing like Shirani's (Pet. 18), about which he testified in unrebutted

---

[23] 18 MOORE'S FED. PRAC. ¶ 134.06[1][c], at 134-45,46 (to set aside statutory interpretation case, special justification required, such as further Congressional action that removes conceptual underpinnings of prior decision); *Goshtasby*, 141 F.3d at 766.

testimony, "this is not my signature". See signatures in this Appendix. (Pet. C.A. Reply Br. 18-23, Tr. 422, RX 35.)[24] The employer provided no rebuttal evidence that the signature *is* Shirani's. See note 16, *supra*. The licensing manager's anger is retaliatory animus that clearly amounts to *more than* a contributing factor in the adverse personnel actions,[25] and it is highly unlikely that the signature on the employer's evidence, RX 35, could have persuaded the factfinder by "clear and convincing" evidence.[26] Thus, it is likely that these findings of fact "were influenced by this mistaken view of the law", warranting reversal on review.[27]

---

[24] Petitioner did not waive this argument before the court below, since he raised it in the opening brief at 34, "Exelon cannot prove by clear and convincing evidence that it would have terminated Shirani's employment in the absence of his high profile GENE audit and contact with the NRC inspector regarding his Holtec dry cask audit", both respondents discussed the conclusion that he applied for the manager position with this document – RX 35, and the decision below reached this issue in its holdings, see above , I.2. at 5 and Pet. App. 4, 6.

[25] *See, e.g., Pillow v. Bechtel Constr. Inc.*, 87-ERA-35, D & O of Remand by SOL, at 13, (July 19, 1993) (foreman becoming angry after employee raised safety concerns is direct evidence of discriminatory motive), and *Mandreger v. Detroit Edison Co.*, 88-ERA-17, D & O of SOL, at 19 (Mar. 30, 1994) (telling employee it was wrong to contact the NRC because management could have solved the problem is direct evidence of discriminatory animus).

[26] *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (evidence that employer's justification for adverse action is untrue may itself constitute "persuasive" circumstantial evidence of intentional discrimination); *Aka v. Washington Hospital Ctr.*, 156 F.3d 1284, 1292 (D.C. Cir. 1988) (en banc) ("a lie is evidence of consciousness of guilt").

[27] *See, e.g., United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983) (vacating judgment for defendant and remanding because lower court applied incorrect standard in last step of Title VII burden-shifting framework – "it is not clear that its findings of fact in favor of [defendant] were not influenced by its mistaken view of the law"); 5 U.S.C. § 706(2)(A) (reviewing court shall hold unlawful and set aside agency conclusions found to be not in accordance with law);

Respondent's claim that the ERA burdens of proof were not reached in the decision below because the ARB found Petitioner failed to meet the knowledge element of the prima facie case (Opp. 9, 10), is not true. The scope of appellate review is broad, and the decision below reached and issued holdings on the full cause of action (as did the ARB and ALJ which also did not stop their analysis at the knowledge element).[28] [29] See I.1, *supra*.

Respondent repeats the serious error, made by both the ARB and court below, of refusing to allow that the knowledge element was met because the supervisor who made the termination decision (Caya) admitted she knew that one of Shirani's quality assurance audits was received unfavorably. (Opp. 13). Quality assurance audits constitute "protected activity".[30] Nothing more is required.

Petitioner clarifies that the decision below ignored the first alternative of his two-part argument about returning to nuclear. (Pet. 17) (Pet. C.A. Br. 31).

CONCLUSION

The petition for a writ of certiorari should be granted.

Old Ben Coal Co. v. Director, OWCP, 62 F.3d 1003, 1007-08 (7th Cir. 1995) (remanding agency decision that applied wrong legal standard).

[28] *Pozzie v. U.S. Dep't of Hous. and Urban Dev.*, 48 F.3d 1026, 1029 (7th Cir. 1995) (presumptively valid agency decision must be reviewed with substantial inquiry, or thorough, probing, in-depth review).

[29] Petitioner mistakenly stated as an aside in his opening brief below, p. 34, that the ARB did not reach the issue of the ERA burdens of proof.

[30] 42 U.S.C. § 5851(a)(D) and (F) (protected activity includes: if an employee commences a proceeding for enforcement of any requirement imposed under the Atomic Energy Act of 1954 and participated in any other manner in such a proceeding or in any other action to carry out purposes of the Act). All quality assurance activity is "protected activity" because licensees must maintain a quality assurance program and that the personnel have the authority and freedom to identify problems and provide solutions. 10 C.F.R. § 50.34(a)(7) Appx. B; *Dunham v. Brock*, 794 F.2d 1037, 1038 n.1 (5th Cir. 1986).

Respectfully submitted.

DOLORES C. PINO
Counsel for Petitioner

7200 Wilson Terrace
Morton Grove, IL 60053-1142
847/965-3354

JUNE 2007

APPENDIX

Rep. EXHIBIT 35

-1a-

EXELON CAREER OPPORTUNITY SYSTEM
ATTACHMENT 7.1 - SELF-NOMINATION FORM

Requisition Position Title: Principal/Manager, Audit Requisition Number: 201296

Name:	Oscar B. Shirani	Current Title:	Principal Auditor
Soc. Sec. No.:	579-90-6308	Salary Grade:	E4
Employee ID:	752890	Current Pay Rate:	47 /hr. 98 /yr.
Department / Work Location:	Corporate Finance, 38th Floor, Bank 1, Chicago	Performance Rating:	1B_(B)_: year 2000_____ 2A (B)_: year_1999 1A (A)__ Year 1998____
Work Phone:	312-394-3081	Dept Head/Manager:	Ms. Ellen Caya (2001)
Other Phone:	630-790-9650 Home 630-695-9065 Pager	Dept Head Phone:	312-394-3728

ELIGIBILITY CRITERIA:

	YES	NO
I am classified as a "regular" full or part-time employee.	☒	☐
I have been rated at least "meeting expectations or equivalent" on my most recent performance evaluation, if such appraisal is conducted, and am currently meeting expectations.	☒	☐
I meet the qualifications as specified in the Exelon Career Opportunity Announcement.	☒	☐
I have been in my current position at least one year (unless this provision is waived by my current department head / manager). I have been in this department for 18 months.	☐	☒

All of the information disclosed on this SELF-NOMINATION FORM is true and correct. I understand that misrepresentation of or incomplete information on this form will remove me from consideration.

Employee Signature: _____ Date: 10/12/01

THIS SECTION MUST BE COMPLETED WITH SIGNATURE BY YOUR DEPARTMENT HEAD / MANAGER OR DESIGNEE, PRIOR TO THE REMOVAL DATE FOR CONSIDERATION

X Approved—Submit to Exelon Employee Service Center
I understand that the above employee may be considered for the position. The employee has been meeting expectations in his/her current position. The employee has been in their position for at least one year. (If no, I agree to waive this requirement). I agree to negotiate a release date with the Hiring Manager should this employee be extended an offer.

Department Head / Manager Signature*: Ellen Caya Date: 10/16/01
*AN ELECTRONIC COPY FORWARDED FROM YOU WITH A NOTE WILL SUBSTITUTE FOR A SIGNATURE

_____Not Approved—Return to local Human Resources Office
Reason for non-release:

ERA 00054

Department Head / Manager Signature: [redacted] Oscar Shirani Date: 10/16/01

Submit one completed SELF-NOMINATION FORM and resume/resume template for each position to the Exelon Employee Service Center by the removal date in order to receive consideration. Fax: 630-684-3409 Outlook: "Employee Service Center" E-mail: EmployeeServiceCenter@ucm.com Company Mail: Business Resource Center / 2011 Swift Drive / Oakbrook, IL 60521 *AN ELECTRONIC COPY FORWARDED FROM YOUR DEPT HEAD/MANAGER WITH A

BEST AVAILABLE COPY

-2a-

58 EOC

COMMIT FOR RESULTS

This form is meant to be used with the CFR Resource Guide and should not be filled in without the Resource Guide as a reference.

Name: Oscar Shirani Year: 1999

Copy

Personal Contribution Statement

Your ultimate commitment to the organization is to satisfy this statement. This statement defines your contribution to the organization and answers the following four questions. Refer to the Personal Contribution Statement worksheet in the Resource Guide for additional help.

- *What are the key products or services I provide for my site?*
- *What potential do I have to impact the overall performance of my site?*
- *In what ways do I make others successful?*
- *Who benefits when I perform my job well?*

Type your Personal Contribution Statement Here....

See attached page

Signatures indicate that commitments were set and agreed upon.

Oscar Shirani — Individual's Signature — Date 9/9/98

Supervisor's Signature — Date 12/9/98

Manager's Signature — Date

Instructions for tranfer and retention of Commitment Form:
If the individual tranfers during the year, the current supervisor should have a final performance meeting with the individual and complete the appropriate area of the Form to indicate which meeting(s) - Planning or Year-end Assessment - has taken place. The current supervisor should confidentially send the current form and those for the preceding three (3) years with the individual's departmental file to the new supervisor.

Commonwealth Edison Company
1411 Opus Place
Downers Grove, IL 60515-5701

ComEd

October 19, 2000
SES-00-138

Mr. Martin Edwards
Quality Assurance Manager
U.S. Tool & Die Incorporated
200 Braddock Avenue
Pittsburgh, PA 15145

Subject: ComEd Follow-up response to your response (Ref. No.1) as a result of NUPIC and DSQG Audit, SR-2000-257 of U.S. Tool & Die (UST&D), Inc., Pittsburgh, PA Facility on June 19-23 and July 5-7, 2000

Reference: 1) UST&D Letter No. 00-0184 From V. Martin Edwards to Oscar Shirani, dated September 05, 2000

Dear Mr. Edwards:

I have reviewed your response as stated in the above Reference No. 1. You have provided the evidence of your corrective action and have indicated that some of the actions to be completed in future date. Your response to the Nine (9) Audit Findings sounds reasonable. However, the subject findings except the Finding No. SR-2000-257-03, which was closed during the audit, remains OPEN pending our verification of your completed corrective actions. Our newly elected Resident Inspector at UST&D, Mr. Roger Gillenwater will perform the follow-up of your corrective action and generate a response which will be concurred by me. Our follow-up will cover all your completed corrective action with a more rigor emphasis on your Special Processes and corrective action program which was determined to be ineffective by the audit team on June 19-23 and July 5-7, 2000.

The cooperation and assistance extended to the audit team by UST&D personnel during the audit is greatly appreciated.

Please refer questions to Oscar Shirani, ComEd Supplier Evaluation Services (SES), at Tel No. 630-663-5873

Prepared By: Oscar Shirani Date: 10/19/00
Oscar B. Shirani, PE
Audit Team Leader

Approved By: Date: 10/20/00
Russell Bastyr
Supplier Evaluation Services Manager

cc: Audit File SR-2000-257
Duplicate File
NUPIC Members

EXHIBIT 9

Exhibit/Business Unit Goal: Communication Skills

Importance: 10 % of Total Goals		Competencies Needed:		Goal Performance
Goal: Clear and concise communication Persuasive presentation Performance Measure: Meeting Results Achieved Mid-Year: On track Results Achieved End of Year:	+	Significant work needed here take right writing/ organization course	=	Mid-year: ☒ On Track ☐ Off Track Year-End: ☐ Distinguished Accomplishment ☐ Achieved Requirements ☐ More is Required

OVERALL PERFORMANCE RATINGS

Place an "X" in appropriate box.

[redacted]

PERFORMANCE FEEDBACK

Use this space for comments or feedback for Midyear, Ongoing, or Year-end Performance.

Supervisor Comments

Mid-Year: Oscar tries very hard and is extremely diligent. Should work on stronger communication skills.

Year End:

Signature: Ellen Cayo Date: 7/19/01

Employee Comments

Mid-Year:

Year End:

Signature: Oscar Silviano Date: